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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

ORIGINAL, NO. 25

IN EQUITY

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF WISCONSIN,

Defendant.

BRIEF ON MOTION TO DISMISS

INTRODUCTION

This is a motion made by the defendant to dismiss the plaintiff's complaint herein for the following principal reasons:

(1) That the complaint fails to state a cause of action;

(2) That the complaint does not recite and set forth the true facts as they appear from official records, of which the court can take notice;

(3) That regardless of the allegations in plaintiff's

complaint, it appears from an examination of the complaint that there has been acquiescence in the boundary as now claimed by the defendant for such a length of time that the court will not now disturb such boundary.

ISSUES PRESENTED BY MOTION

This action is filed by the state of Michigan against the state of Wisconsin, seeking to redetermine the boundary line between the two states. The state of Wisconsin, defendant herein, maintains that from an examination of plaintiff's complaint, and viewing it in the most favorable aspect, and considering those public records, documents, official actions, and matters of common knowledge, of which this court takes judicial notice, it appears that this complaint is without merit, and should now be dismissed because of such fact.

Michigan's bill of complaint is grounded upon the proposition that the original survey of the boundary line did not accord with the description of the boundary line as the description was set forth by Congress when the state of Michigan was admitted to the Union, and that though such surveyed line does accord in most respects with the description of the boundary line of the state of Wisconsin as contained in the enabling act of said state and adopted by the act of Congress admitting the state of Wisconsin to the Union, such enabling act, being subsequent to the act of Congress admitting the state of Michigan into the Union, must give way to the rights of Michigan as they are alleged to have accrued prior to the creation of the state of Wisconsin in all those respects wherein the two boundary lines overlap each other or are in conflict.

The motion of the state of Wisconsin rests primarily

upon the well established principle that long continued acquiescence by the complaining state in a boundary line not conforming exactly to the description of such boundary line as contained in the grant to such state, and long continued exercise of jurisdiction over the territory in question by the defendant state, coupled with a general recognition and acceptance of such boundary line, operates to validate it and vest in the defendant state from the beginning a valid title by prescription or a right in the nature of a prescriptive right, and that the right so established and recognized takes effect, not as an alienation of territory, but as a definition of the true or ancient boundary. The continued claim on the part of the state of Wisconsin recognized, in the manner hereinafter indicated by both the federal government and the state of Michigan, amounts to a practical construction of the original act, if Michigan's theory of ambiguity and uncertainty is correct, and if that theory be rejected, it is our theory that there has been a universal and general recognition of Wisconsin's claim over so long a period that society has adjusted itself and rights have accrued from the hypothesis of Wisconsin's sovereignty over the disputed territory that Michigan must be held to have waived any rights that she may ever have had in such territory. This, we think, substantially states the issue presented by this motion.

HISTORICAL BACKGROUND OF CONTROVERSY

Michigan boundary

As appears by plaintiff's complaint, by an act of Congress, approved January 26, 1837 (5 U. S. Stats. at L. 144), the state of Michigan was admitted into the Union and granted sovereignty over the territory described in her enabling act, which act was dated June 15, 1836 (5 U. S. Stats. at L. 49), with a northeastern boundary as follows:

> "* * * thence through the middle of the main channel of the said River Montreal, to the middle of the Lake of the Desert; thence in a direct line to the nearest headwater of the Menomonie River; thence through the middle of that fork of said river first touched by the said line, to the main channel of the said Menomonie River; thence down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan * * *."

Wisconsin territorial boundary

The territory of Wisconsin had been set off shortly prior to Michigan's enabling act, by an act of Congress approved April 20, 1836 (5 U. S. Stats. at L. 10), with a boundary exactly the same but described in reverse order, as follows:

> "To a point in the middle of said lake (Lake Michigan) and opposite the *main* channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie River; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the middle of

said lake; thence through the middle of the main channel of the Montreal River, to its mouth; thence with a direct line across Lake Superior. * * *."

The bill of complaint filed by the State of Michigan contains some brief account of the factors which lead to the division of Michigan's territory in this way, and an explanation of the reasons for the description of the boundary that is found in these statutes. (Complaint, pages 2 and 3.) Congress erroneously believed that the Northern Peninsula was divided from the body of Wisconsin by a natural water-way consisting of the rivers Montreal and Menomonee, supposed at that time to have had a common source in the form of a large lake, generally referred to as Lac Vieux Desert (Lake of the Desert). Contrary to the statement made in paragraph 5 of plaintiff's complaint, the public records now available indicate that this error was not discovered until shortly prior to the time of the survey made by Captain Thomas Jefferson Cram, and that this mistake was verified by Cram and reported to Congress.

Boundary survey provided for

By an act approved June 12, 1838 (5 U. S. Stats. at L. 244), Congress directed that the said boundary be correctly established and a boundary line "surveyed, marked and designated", and directing the making of a plat or plan of the boundary between the state of Michigan and the territory of Wisconsin. By an act approved July 20, 1840 (complaint, page 6), the superintendence of the survey of such boundary was placed under the war department. Captain Cram was directed to take charge of the survey by the war department through its bureau of topographical engineers. The first trip to the

territory in question was made in the summer of 1840 in pursuance of these two acts.

The survey was not completed in that year, and a further appropriation bill was passed by Congress and approved March 3, 1841 (complaint, paragraph 10, page 16). That bill provided in part as follows:

> "That for the purpose of designating and marking the boundary line between the state of Michigan and the territory of Wisconsin, agreeably to the true intent and meaning of the second section of the act entitled, 'An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of Michigan into the Union, upon the conditions therein expressed', there be, and is hereby appropriated, the sum of six thousand dollars, to be expended under the Secretary of War, in the survey and examination of the country situated between the mouths of the Menominee and Montreal Rivers, who is hereby directed to cause to be made a plat or plan of such survey and examination, which shall be returned to Congress with all convenient dispatch."

Captain Cram completed his survey in 1841 and submitted his report to Congress. Herewith follow Captain Cram's reports, instructions and findings:

Captain Cram's first report
(Senate Document 151, 26th Congress, Second Session, Vol. 4)

The following directions were given to Captain Cram to guide him in making the proper survey:

> "The survey now committed to you is that of the boundary between the state of Michigan and the territory of Wisconsin. • • •
>
> "The boundary is described as follows: (Then follow those parts material to the duty assigned.)
>
> "The middle of rivers is not an unusual boundary between states. It is, however, always an imaginary one, as it cannot be distinctly marked out.

The boundary of a river is a distinct physical boundary not to be mistaken where the river is known. Although, therefore, rivers which form boundaries may be erroneously based upon maps, they are easy to be found in nature, and their erroneous position upon maps cannot lead to any error or mistakes of jurisdiction in the adjoining authorities. There is no necessity, therefore, for surveying these, unless to have a correct delineation of the territory. A desirable object, without, but not yet being absolutely necessary, it may be delayed without injurious consequences and with great propriety when it is doubted if the amount appropriated will make the whole survey.

"The usual ship channel of Green Bay is presumed to mean the *best*, as such would be the one generally resorted to. The expression, however, clearly implies the existence of more than one channel and the necessity in consequence of surveying the whole of Green Bay in order to determine which of its ship channels is the best.

"The line from the head of Montreal River to the head of the Menominee must also, of necessity, be surveyed as it is an undetermined line without distinct physical characteristics. This line, it is said, must pass through Desert Lake. Recent information induces the belief that there are several lakes, between the head-waters of these two rivers, called Lakes of the Desert. They are so delineated and named on some maps of that locality which I have examined. The survey will, however, give correct information on this subject. * * * ."

Captain Cram states:

"In the same letter of instructions, explicit directions were communicated with reference to the place of commencing the survey. In obedience to these directions, the survey was commenced on that part of the boundary which may be called imaginary, or that which is not characterized or marked by natural or physical features, viz.: the portion between the head-waters of the Montreal and Menominee Rivers."

The description of the boundary contained in the enabling act of the state of Michigan contemplated a continuous waterway separating the Northern Peninsula from the rest of the territory. Of this, Captain Cram said:

> "On a careful reading of the foregoing description of the boundary, it will be inferred:
>
> "1st. That Lake of the Desert was supposed, in the act of Congress, to be a head-water of, and to discharge itself into, Montreal River; for the words in the description are, 'thence through the middle of the channel of the said River Montreal, to the middle of the Lake of the Desert'.
>
> "2d. That somewhere between Lake Superior and Green Bay, there was a known lake bearing the name 'Lake of the Desert'; for the language describing the boundary specified that the 'middle of the Lake of the Desert' shall be a point in the boundary.
>
> "3d. That of all the head-waters discharging themselves into the Menomonee River, one would be found nearer to the said Lake of the Desert than any other; for the description says, 'thence in a direct line to the nearest head of the Menomonee River";
>
> "4th. That the nearest head of the Menomonee to the said lake would be found to be a branch of the Menomonee and not a lake; for the description reads, 'thence through the middle of that fork [branch] of the said river just touched by the said line, down the centre of the main channel of the same', etc.
>
> "The four suppositions here enumerated were doubtless made by the committee of Congress who draughted the description of the boundary, and predicated on information derived from a map similar to one entitled, 'Map of the entire Territories of Wiskonsin and Iowa, published by order of the Legislative Assembly of Wiskonsin, by L. Judson', and which was supposed to present a more accurate delineation of the waters between Lake Superior and Green Bay than any other map extant.

"An exact copy of as much of said map as is necessary for illustration is attached to this report, and marked No. 1.

"Upon this map, it will be perceived that the boundary between Michigan and Wiskonsin is laid down as following a direction from Lake Superior nearly southeast to Green Bay; and that the courses of the Montreal and Menomonee rivers, taken together, constitute a general route in the same direction; and that Lac Vieux Desert (Lake of the Desert) is not only represented on this map as being the head of the Montreal, but is likewise represented as the head of the Menomonee." (Senate Document 151, p. 4.)

Captain Cram's expedition made plain the error of this belief in a continuous water-way running from the shore of Lake Superior to the shore of Lake Michigan.

"Now, although the map from which No. 1 has been copied bears the high sanction of a legislative assembly, it is proven by the survey that that portion of this map upon which the boundary is laid down is exceedingly erroneous; and therefore, if it be true that this map, or one similar to it, was taken as a guide in draughting the description of the boundary, it is not surprising that the said description, so far as it relates to the head-waters of the Montreal and Menomonee, is so worded that the conditions of the act defining the boundary cannot be complied with, to the full extent of all the requirements contained in said act." (P. 4.)

The actual situation was very different.

"It was ascertained that Lac Vieux Desert, or 'Lake of the Desert,' has no connexion whatever with the Montreal river; and that the nearest distance between said lake and this river is such, that an Indian requires eight days, without a pack, to pass from one to the other: and it is also believed, with much confidence, that the Montreal river does not head in a lake, but takes its rise in an extensive swamp. Neither is Lac Vieux Desert, or 'Lake of the Desert', at all connected with the Menomonee

river; but this lake was found, contrary to the opinions of all except the Indians, to be the principal head of the Wiskonsin river.

"The Montreal river was found to have a course different from what was supposed; so have the courses of the Menomonee, and of its principal branches, been equally mistaken and misrepresented." (P. 5.)

"Again: from the course which the Montreal river is not found to have, and from the fact that Lake of the Desert has no connexion whatever with this river, it will also be perceived that it would be impossible to run a line according to the meaning of the words in the description of the boundary, 'thence through the middle of the channel of the said river Montreal, to the middle of the Lake of the Desert.' It is true, that the channel of the river might be followed to its very head, and from this head a line could be run over the ground to the middle of the Lake of the Desert; but it is not presumable that such a random line was ever intended by Congress to constitute any portion of the boundary in question. It was undoubtedly supposed that the Lake of the Desert was the head of the Montreal; and that a natural boundary would be found to be provided all the way from the mouth of the Montreal to the middle of said lake; and that it would only be necessary to mark out a line from the middle of this lake to the nearest head-water of the Menomonee river.

" * * *

"From the foregoing discussion of the route, it will now appear that it would be exceedingly difficult, yea, utterly impossible, to run the boundary line in complete accordance with the present reading of the description in the act of Congress; particularly on that part of the ground between the Montreal river and the head of the Menomonee (the Brule river) which comes nearest to 'Lake of the Desert.' And from all the circumstances of the case, it is evident that another action of Congress will be required in relation to this boundary, to the end of *defining* it in such a manner that it can be estab-

lished either upon the ground, or laid down on a map, with that degree of definiteness which should always characterize a boundary line between two States." (P. 6.)

Captain Cram made certain suggestions:

"There is no doubt of Lac Vieux Desert (as written on the map, and generally so called) being the identical lake with that which seems to have been intended in the description of the boundary, and therein called 'Lake of the Desert', and whose middle is made one point of the boundary.

"The three islands of this lake have, from their relative positions, been named South island, Middle island, and North island.

"Lac Vieux Desert, now being known, might be brought into the boundary, by specifying some point within the periphery of the lake for one physical point of the boundary. All indefiniteness, much labor, and expense, would be avoided by simply saying, in the law, that the highest point of ground (whether of earth or rock) upon Middle island shall be the point, instead of saying 'middle' of the lake.

"The present description of the boundary makes the 'middle of the channel' of the Montreal river a part of the boundary. The term 'middle of the channel' is indefinite, because islands may occur, which would of course cause more than one channel. By specifying which channel in such cases shall be followed by the boundary-line, another ambiguity would be avoided. It is also evident, that it should be specified how far up the Montreal the boundary shall extend, before leaving for Lac Vieux Desert. For example: the law might specify that the boundary, in ascending, shall follow the extreme right-hand channel, from the mouth of the river, up to where it shall be found to be intersected by a straight line drawn from the highest point of Middle island, to some specified point of Montreal river. Such a description would be divested of vagueness, and would allow of this portion of the boundary being established at comparatively less cost.

"As the shortest line from said point on Middle island to the nearest water flowing into the Menomonee would probably terminate in a swamp, (see map No. 3,) it would be well to say that this part of the boundary shall be a direct line from the highest point of Middle island to the middle of the channel of the outlet of Lac Brule; thence through the middle of the Brule river, etc.

"The 'centre of the main channel' of the Menomonee river is made a part of the boundary. This river contains numerous islands, and consequently more than one channel where these islands occur. It will be impossible in many of these cases to know which is the 'main channel', without minute surveys. In many cases it was tried, and found impossible to decide by a simple inspection or reconnoissance which was the 'main channel.' It should also be remarked here, that the term 'main channel', applied to the multiplicity of channels of the Menomonee, would be somewhat ambiguous in any event; for, it may be asked, is the main channel the widest channel of the river, or is it the deepest? If it be the widest or deepest now, will it be the widest or deepest hereafter? or shall the main channel be that through which the greatest quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water, which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term 'main channel.' There are also a few islands in the Brule river, to which similar questions might apply, in reference to the term 'main channel." (P. 7.)

"To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that, in descending the stream, the boundary shall follow the extreme left-hand channel of the Brule, and the extreme right-hand channel of the Menomonee, down to a well known point of the river—say, Pe-me-ne falls; and thence to follow the extreme left-hand channel of the re-

mainder of the Menomonee to its mouth. Such a division would leave some of the islands in Michigan, and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the 'main channel', and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purposes of navigation would, from an established principle of law, be open at all times to the citizens of either State, and the islands would be nearly distributed in equal proportions between the two States." (P. 8.)

As to the most usual ship channel of Green Bay, Captain Cram was not in doubt.

"After descending the channel of the Menomonee 'to the centre of the most usual ship-channel of the Green bay of Lake Michigan', the boundary is made to run 'thence through the centre of the most usual ship-channel of Green Bay, to the middle of Lake Michigan.'

"From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green bay would cause several ship channels. It is a well-known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be necessary to decide the question, which of these is the 'most usual ship-channel of Green Bay?' And it is not easy to conceive any other mode (than by testimony) by which the 'most usual ship-channel' could be ascertained. But suppose this method of collecting testimony practicable: it might occur that all the evidence that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the 'most usual ship channel' in this part of the bay." (P. 8.)

Captain Cram's whole report goes on the assumption that Congress has described a boundary that could not physically exist, and that therefore no land titles became fixed by it. His report quite apparently indicates a latent ambiguity in this description of the boundary, and such ambiguity having developed, he thought it fitting and proper to make recommendations to Congress which would enable Congress ultimately to fix a fixed and specific, readily determinable boundary line. This was only natural when it is considered that Congress thought its original designation of a boundary was so indefinite and uncertain that it would have to be marked out, surveyed and outlined. The conclusion of Congress that such action was necessary is justified by the report of Captain Cram pointing out the methods whereby the boundary could be more specifically fixed and in what respects ambiguity existed in the boundary as considered by the committees that dealt with the problem of defining the boundaries of the territory of Wisconsin and the new state of Michigan. Captain Cram continues:

> "Such a description as this, if authorized by Congress, would allow of the boundary being established without any material difficulty; and it would cause no material departure from what is conceived to have been the intention of the law as it is now worded. The proposed description would moreover leave the State of Michigan and the Territory of Wiskonsin with nearly the same relative quantities of territory as they would have respectively possessed had the Montreal, and the Menomonee, and Lac Vieux Desert, been found situated as was supposed in framing the present law of the boundary. Besides, the field operations, which will be necessary to establish the boundary, would be attended with much less expense, on account of having to make no

Nº 2.
CORRECTED MAP
OF THE COUNTRY ALONG THE
PROPOSED BOUNDARY BETWEEN
MICHIGAN
AND
WISKONSAN
To accompany the Report
of Capt T.J. Cram
December 1840
LAKE SUPERIOR
Montreal R.
Wisconsan R.
Rock R.
Grand Rapids

minute surveys of the islands (and consequent channels) in the Montreal, Brule, and Menomonee rivers." (P. 9.)

Captain Cram's Second Report

(Senate Document 170, 27th Congress, Second Session, Vol. 3)

Captain Cram's second survey was made in pursuance of the following instructions:

> "Your operations should have in view a correct delineation of the country between the headwaters of the Menomonee and Montreal Rivers, so that all the matters requisite to determine a boundary between these two points can be laid before Congress. A correct survey of these two rivers should also be made, which will probably be the extent of your operations for this year." (Senate Document No. 170, 27th Congress, Second Session, p. 2.)

He continued the survey West from Lac Vieux Desert.

> "Accordingly, the survey of this intervening district was commenced at Lac-vieux-Desert (see map No. 1), the place where the operations stopped in the autumn of 1840, and was extended in the direction as nearly as could conveniently be ascertained, toward the head-waters of the Montreal.
>
> "After reaching what was supposed to be those head-waters, the line of the survey was carried down stream to Lake Superior, when it was discovered that the Ontonagon, and not the Montreal, had been reached; and thus it was conclusively proven that the head-waters of the Montreal were to be found a very considerable distance further toward the west than had formerly been supposed. And the evidence of this circumstance was very much strengthened by having discovered, the year before, that Lac-vieux-Desert was the head of the Wisconsin, which was known to run toward the

south, instead of being, as was formerly supposed and represented on the maps, the head of the Montreal." (P. 2–3, Senate Document No. 170, supra.)

Captain Cram fixed upon the junction of "two inconsiderable streams, not more than twenty or thirty feet wide, called Balsam and Pine Rivers" (p. 3) as the head proper of the Montreal River. This was done deliberately and with full knowledge that the Pine River headed in a small lake called Pine Lake, as appears from Captain Cram's report.

> "The latter of these streams was explored to its very head, and found to come from a small lake, and all its feeders are represented on the map (No. 1). This small lake was connected by an offset-line with the main line of the survey; so that if Congress should deem it necessary or expedient to constitute this little lake, which I have called Pine lake, as the head of the Montreal river, its position will be accurately known." (P. 3, Senate Document No. 170, supra.)

All the facts with relation to these streams and this part of the Montreal River were fully brought out and minutely mapped, and by virtue of this report and the maps drawn by Captain Cram, familiar to the government officials and to officials of the state of Michigan, Congress for the first time had before it such accurate information upon which it could finally designate a specific and fixed boundary line.

The Montreal River was carefully surveyed from its source to its mouth, and Captain Cram was familiar with the tributaries, of which there were several flowing in from the West.

> "This river was surveyed from its mouth up to its highest source, and is represented on map No. 4, from which it will be perceived that the streams feeding this river almost all come from the west. Indeed, there are none entering from the east that

can be considered more than small brooks or drains from swamps. None of these are so broad that they can not be stepped across without wetting a foot.

"The tributaries from the west generally head in small lakes, and on reaching the Montreal, are deflected toward the north by the dividing ridges separating the Montreal from the head-waters of the other rivers running into Lake Superior—such as the Carp, the Iron, and the Ontonagon.

"The head proper of the Montreal is to be regarded, as before stated, at the junction of the Balson and Pine. At this point, in times of high water, a canoe may be put in and safely run to the mouth, by making several portages." (P. 5, Senate Document No. 160, supra.)

The Montreal River was found to be about 34½ miles in length, but very winding. The distance in a straight line from its head to its mouth was 18 miles.

With regard to the Menomonee River, Captain Cram said:

"The Brule and Menomonee constitute a very good natural boundary; the precaution, however, should be taken of dividing the numerous islands, so that some may fall within one, and the remainder within the other State. The number of islands in the Menomonee amount to 131: 18 of the principal contain 2,304 acres; some of these are over one mile in length, and from one-eighth to one-fourth of a mile in breadth, and are covered with an excellent growth of pine.

"Innumerable channels occur among the groups of islets; and the best way of disposing of the islands would be, to declare, by legislative enactment, that all the islands down to a certain point (to be specified) shall belong to Michigan, and all below that point to Wisconsin. A case of litigation has already commenced, I am informed, in reference to one of these islands, and the court has been at a loss to decide, from not knowing to whose jurisdiction it belongs." (P. 5–6, Senate Document No. 170, supra.)

The Burt survey

On August 10, 1846, four days after the passage of the Wisconsin Enabling Act, Congress included in its general appropriation act (9 U. S. Stats. at L. 85, at 87) a provision, as follows:

> "Sec. 4. And be it further enacted that the surveyor general northwest to the Ohio under the direction of the President, be, and hereby is required to cause to be surveyed, marked and designated, so much of the line between Michigan and Wisconsin as lies between the source of the Brule River and the source of the Montreal River as defined by the 'Act to Enable the People of Wisconsin territory to form a constitution and state government, and for the admission of such state into the Union, and the expense of such survey shall be paid, upon the certificate of the Surveyor General, out of any moneys in the treasury not otherwise appropriated, not exceeding one thousand dollars.'"

Pursuant to this appropriation, the survey known as the Burt survey was made, surveying and marking the line run by Captain Cram from Lac Vieux Desert to the point marked on the Cram survey as the head of the Montreal River.

The Wisconsin enabling act

Prior to the appropriation for the Burt survey, and on August 6, 1846, Congress passed an act authorizing the people of the territory of Wisconsin to form a state government (9 U. S. Stats. at L. 56), and therein the northeastern boundary was described as follows:

> "Beginning at the northeast corner of the state of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of 42 degrees and 30 minutes of north latitude crosses the same;

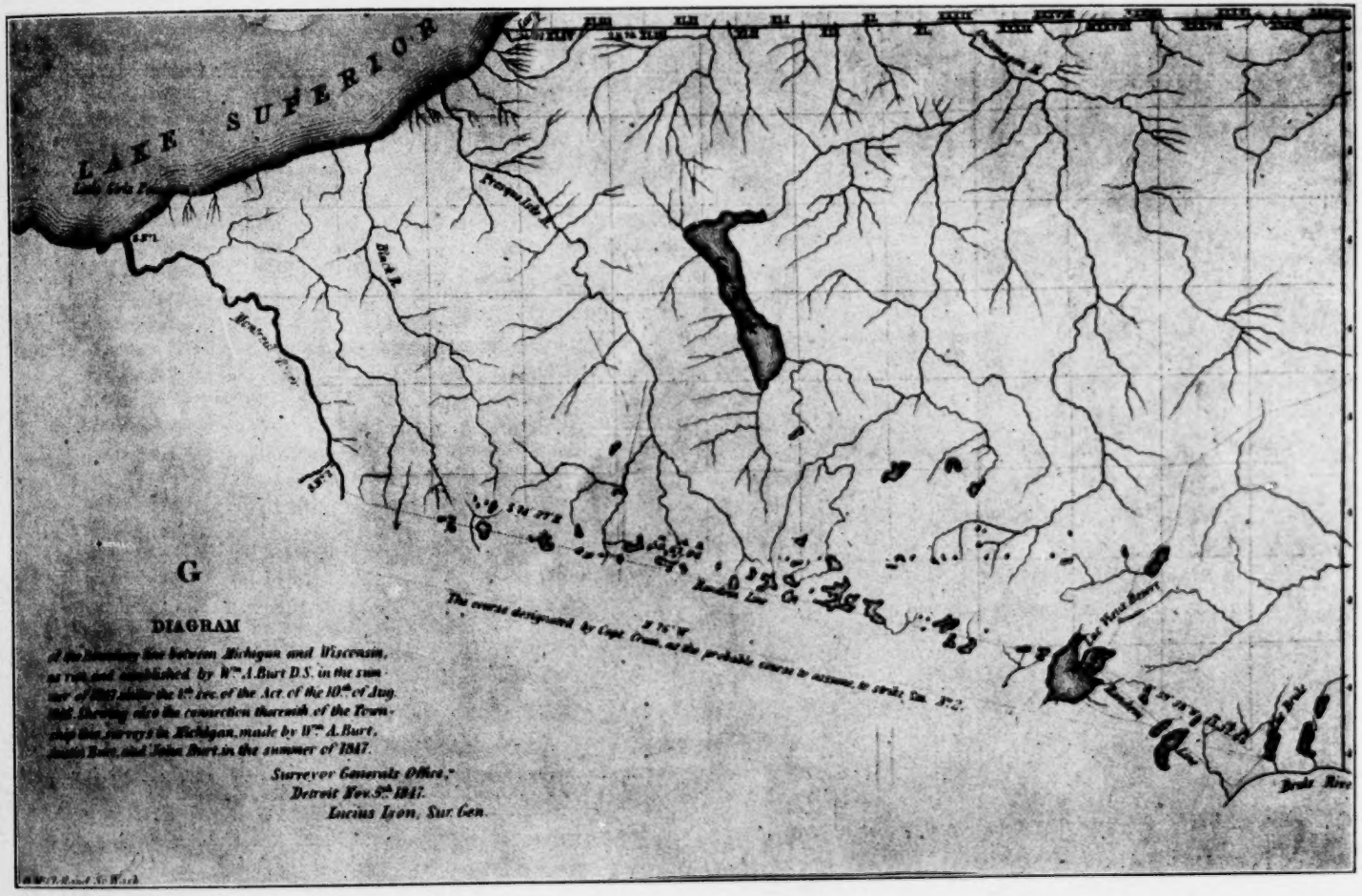

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DIAGRAM

of the boundary line between Michigan and Wisconsin, as run and established by Wm. A. Burt D.S. in the summer of 1847 under the 4th sec. of the Act of the 10th of Aug. 1846. Showing also the connection therewith of the Township lines surveys in Michigan, made by Wm. A. Burt, Austin Burt, and John Burt in the summer of 1847.

Surveyor Generals Office,
Detroit Nov. 5th 1847.
Lucius Lyon, Sur. Gen.

thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brule River; thence along the last mentioned river to Lake Brule, thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cram; thence down the main channel of the Montreal River to the middle of Lake Superior.

"To prevent all disputes in reference to the jurisdiction of the islands in said Brule and Menominee Rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee Rivers (to the extent to which said rivers are adopted as a boundary) down to and inclusive of the Quinnesec Falls of the Menominee; and from thence the line shall be so run as to include within the jurisdiction of Wisconsin, all the islands in the Menominee River from the Falls aforesaid, down to the junction of said river with Green Bay:

"That the adjustment of boundary as fixed by this act between Wisconsin and Michigan shall not be binding on Congress unless the same shall be ratified by the State of Michigan on or before the 1st day of June, 1848."

By an act approved May 29, 1848, Congress admitted the state of Wisconsin into the Union (9 U. S. Stats. at L. 233), with "the boundaries prescribed by the act of Congress approved August 6, 1846."

Michigan's constitution 1850

In the year 1850, the state of Michigan adopted a new constitution, and therein the boundaries of the state were described as follows:

"To the mouth of the Montreal River; thence through the middle of the main channel of said River Montreal to the headwaters thereof; thence in a direct line to the center of the channel between Middle and South Islands in Lake of the Desert; thence in a direct line to the southern shore of Lake Brule; thence along said southern shore and down the River Brule to the main channel of the Menominee River; thence down the center of the main channel of the same to the center of the most usual ship channel of Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said Bay to the middle of Lake Michigan."

This is identical with the description contained in the enabling act of Wisconsin, except that the line is described in reverse order, and except for the omission of the words "as marked upon the survey made by Captain Cram."

Michigan's constitution 1908

No change was made in the constitution of the state of Michigan until 1908, when a new constitution was adopted, to go into effect January 1, 1909, setting forth the boundary now in question, as follows:

"• • • to the mouth of the Montreal River; thence through the middle of the main channel of the westerly branch of the Montreal River to Island Lake, the headwaters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brule, thence along said southern shore and down the River Brule to the main channel of the Menominee river; thence down the center of the main channel of the same to the center of the most usual ship channel of Green Bay of Lake Michigan; thence through the center of the most usual ship channel of said Bay to the middle of Lake Michigan."

The act under which the Constitutional Convention of 1907 and 1908 convened provides that:

> "The convention shall, before its adjournment, prepare and adopt an address to the people of the state, explaining the proposed changes in the present Constitution, and the reason for such changes, and such other matters as to the Convention shall seem advisable."

Contrary, however, to this provision, the text of the constitution, as published in the address to the people, indicates only that the words "Island Lake" are new, and no indication whatsoever appears that the words "westerly branch" (referring to the Montreal River) are new, and the note to such article of the constitution is also deceiving, which reads:

> "Words printed in italics in the revision indicate the insertion of new matter. The use of stars, thus * * * indicates the omission of words contained in the present constitution."

Moreover, the amendment to the original boundary definition, being File No. 185 of the proposed changes to the constitution of the Convention of 1907–8, indicates that the only new matter appears in lines 8 and 20 of this file, being the words "point" and "Island Lake", while in truth and in fact the words "westerly branch" were also new and materially qualify former boundary descriptions.

1909 AMENDMENT NO ASSERTION OF SOVEREIGNTY

Not only does it appear that the people were misled in adopting the constitution with these changes as to boundaries, and that the provisions under which the convention was assembled were flagrantly violated, but also it seems that the motives of those introduced were

not proper. The new terms were not the result of public clamor for the enforcement of Michigan's rights, as the bill of complaint implies, but the making up of a claim solely for the purpose of forcing from the state of Wisconsin a favorable settlement. Mr. Benton, Chairman of the Committee on Boundaries, in explaining the change to the delegates, stated:

> "It is properly inserted there for the purpose of having such influence as it might upon any settlement that we may enter into with the state of Wisconsin." (Debates, p. 766.)

These delegates, then, or rather, some of them, with no authority of the legislature or the governor, procured the setting forth in their constitution of a claim to the entire territory which had for nearly a century belonged to Wisconsin, solely for the purpose of creating a controversy which might later become the basis of settlement. In spite of this provision of the constitution, this claim was permitted to sleep from 1908 until 1919, when some action was again taken with a view of making some claim to the disputed territory, as set forth in the complaint. In the meantime, however, and even up to September, 1923, the state authorities, in official publications, and the legislature, in making a division of legislative districts, used maps and districted these territories on the basis of the old recognized boundary, rather than on the new boundary, showing either that Michigan was not making a serious claim, or that even at this late date the legislature, the governor, and the people generally did not know what the real effect was of the definition of the boundary in the new constitution.

The legislature of the state of Michigan, by Act No. 30 of the Public Acts of the First Extra Session of 1921, authorized the attorney general of the state of

Michigan to bring an action to have the disputed boundary line established and marked, and this action was brought in pursuance of that act.

Wisconsin constitution

To turn again to Wisconsin, the constitution adopted in 1848 provides:

"Section 1. It is hereby ordained and declared that the state of Wisconsin doth consent and accept of the boundaries prescribed in the act of congress entitled 'An act to enable the people of Wisconsin territory to form a constitution and state government, and for the admission of such state into the Union,' approved August sixth, one thousand eight hundred and forty-six, to wit: Beginning at the northeast corner of the state of Illinois—that is to say, at a point in the center of Lake Michigan where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running with the boundary line of the state of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menomonie river; thence up the channel of the said river to the Brule river; thence up said last-mentioned river to Lake Brule; thence along the southern shore of Lake Brule, in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal river, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal river to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis river; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the River St. Croix; thence down the main channel of said river to the Mississippi; thence down the center of the main channel of that river to the northwest corner of the state of Illinois; thence due east with the northern boundary of the

state of Illinois to the place of beginning, as established by 'An act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states,' approved April 18th, 1818.

"Section 2. The propositions contained in the act of congress are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States."

The boundaries provided for in the constitution of 1848 remain in force today.

ANALYSIS OF MICHIGAN'S CLAIM

(a) Michigan's claims are founded upon three principal propositions:

1. That the first boundary contained in the enabling act of Michigan and the Wisconsin territorial act is fixed and certain, and unalterable.
2. That the present boundary is not that first given, and the territory embraced within the present boundary does not contain all the territory intended to be given to Michigan by her enabling act.
3. That the public officials of Michigan were unaware of the actual facts until after 1885.

(b) The complaint is also founded upon certain secondary propositions:

1. As to the Montreal River area—
    a. That by Montreal River, Congress meant the west branch of the Montreal River;
    b. That Island Lake is the proper point for the land boundary to begin, and that instead of leading through the lake commonly known as Lac Vieux Desert, the boundary line should run directly

to Lake Brule, on the theory that Island Lake is the Lac Vieux Desert intended by Congress.

2. As to the Menomonee River boundary—
   a. No claim is made except lack of knowledge as to exact situation by the public officials of Michigan.
3. As to the Green Bay area—
   a. Lack of knowledge as to the exact situation.
   b. That the most usual ship channel cannot mean the best ship channel.

MICHIGAN'S PRINCIPAL CLAIMS

The boundary specified in the Michigan enabling act and Wisconsin territorial act was not fixed, certain and unalterable

As stated in the analysis above, the contrary of the foregoing proposition forms one of the principal propositions contained in Michigan's complaint. This proposition presupposes absolute knowledge of the conditions existing along the course of this proposed line at the time Congress adopted the acts in question. Michigan's own complaint negatives this fact, when on page 12 it refers to the map used by the judiciary committee of the senate in 1834 when the question of a compromise of the Ohio dispute first came before Congress. The map there referred to was a map similar to the map attached to the plaintiff's complaint, and marked "Exhibit B", and which showed a continuous water boundary from Green Bay to Lake Superior by way of the Montreal River, the Lake of the Desert and the Menomonee River. Moreover this claim is founded on the proposition that the so-called West Branch of the Montreal River is the larger, and that Congress had in mind and knew the exact volume

of water flowing through the various branches of the Montreal River. The last proposition is so doubtful that as plaintiff's complaint shows, it cannot be determined except by extensive engineering experiments. (Complaint, p. 39.) The actual fact is that Congress had in mind only a stream following a general direction toward Lac Vieux Desert, that stream was known as the Montreal River, and the east branch most nearly follows the course of the stream in the minds of Congress. The fact that two expeditions were necessary, and extensive engineering work was necessary to determine the proper line as construed by Wisconsin and the United States Government throughout the period since the establishment of this line, indicates that there was such grave doubt and uncertainty that this line could under no circumstances become fixed. This fact is further substantiated by the fact that Congress considered its action in establishing the boundary in the first instance as only temporary, and for that reason, after having additional information as a result of Captain Cram's two expeditions to this territory, more specifically described the boundary and directed a survey to be made and the line, not evidenced by natural boundaries, properly marked with proper monuments. This was done by the survey of Burt in 1847. (9 U. S. Stats. at L. 85, at 87.)

An examination of the investigation made by Captain Cram and a reading of that part of the report heretofore quoted (see pages 6–15) clearly indicates the various uncertainties that existed as to this boundary, the indefiniteness which must necessarily follow from describing a boundary through a country as little known as this region was at that time. The fact that Congress in a large measure accepted Captain Cram's recommendations

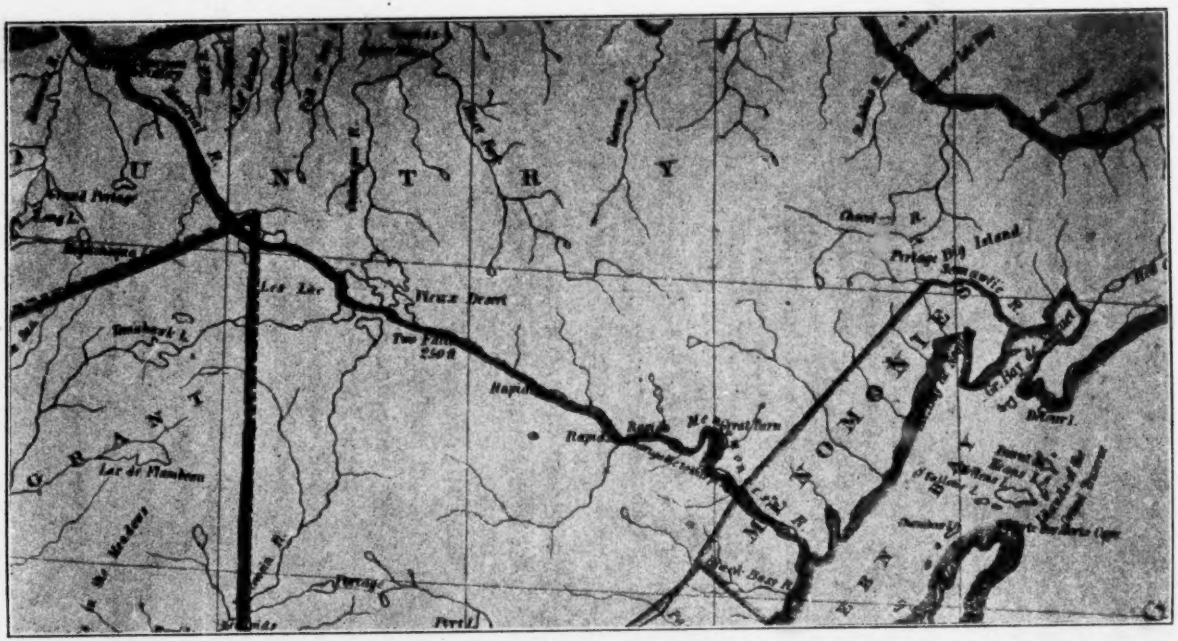
clearly shows that it considered the original boundary as only approximating the ultimate boundary. That this was the understanding of Michigan at the time is conclusively established by the resolution and petition of the General Assembly of Michigan, passed June 15, 1836, and being incorporated as Senate Document 186, 26th Congress, Second Session, Vol. 4, 1840–41, which recites that a strict and literal conformity with the directions contained in the act of Congress establishing such boundary was impossible, and petitioned Congress to appoint commissioners to definitely fix such boundary. Congress apparently, rather than to enter into a new dispute with the authorities of Michigan, decided that it would determine what this boundary should be, and delegated its own representative, Captain Cram, to make such survey and to give his report. This fact, however, does not militate against the proposition that even the Michigan authorities in 1836 did not consider this boundary final and unalterable.

The present boundary is in substantial accord with the original description contained in the enabling act of Michigan and the Wisconsin territorial act

This proposition is founded on the report of Captain Cram which shows conclusively that the lines which he finally established and followed most nearly approached the first theory of Congress; that is, for a continuous natural water-boundary through Lac Vieux Desert. He took that part of the Montreal River which most nearly approached Lac Vieux Desert. He called the attention of Congress to the difficulty of running a line through the center of Lac Vieux Desert, and pointed out a method whereby a definite line

through this lake could be fixed by establishing some fixed point in the lake which the line should cross. (See Cram Report, p. 11) In this respect, Congress accepted his recommendations. (Wisconsin Enabling Act, p. 18) By reason of this construction, we have the present line substantially approximating a straight line drawn from the mouth of the Montreal River to Lac Vieux Desert, the very boundary line which was contemplated by Congress when it considered that the Montreal River had its source in Lac Vieux Desert. The present line more nearly conforms to the intention of Congress, because it passes through the Lac Vieux Desert which undoubtedly was in the minds of Congress in determining upon this boundary line.

In this connection, we call the court's attention to Exhibit B in plaintiff's complaint, which specifies Lac Vieux Desert as a large lake. Moreover, it shows the Montreal River as a considerable river with a general direction very closely approximating the actual direction of the so-called East branch of this river, and showing moreover a branch of said river leading out of a very small lake. Again, in Exhibit A, the course of the Montreal River relied upon by Congress for the boundary is entirely different from that of the West branch of the Montreal River, and very nearly follows the direction of the so-called East branch of said river, and while it refers to a series of lakes as Lakes of the Desert, these lakes are clustered about very closely and include Ontonagon Lake, and do not include the lake which is shown to be the source of the Montreal River on such map. (See map on opposite page which shows this same area on a larger scale.)



Detailed reproduction of Exhibit "A" in the bill of complaint.

We call the court's attention particularly that the reproduction marked Exhibit A in plaintiff's complaint is inaccurate in that the westerly branch of the Montreal River is not fully designated, while in truth and in fact, as fully appears upon the accompanying map, such branch does appear, but the boundary line entirely ignores it. Moreover, the lake which is shown as the source of the Montreal River comes very close to Lac Vieux Desert, and is in an entirely different location with reference to Lac Vieux Desert than Island Lake is, and that if the present boundary line is followed, it will produce nearly a straight line of boundary between Lake Superior and Green Bay.

The public officials of Michigan were aware of the situation with reference to this boundary

This fact is evidenced by the resolution and petition submitted to Congress, found on pages 15 and 16 of plaintiff's complaint, and is particularly indicated by this significant language:

> "Whereas a *critical* examination of the topography of the country through which the boundary line between this state and the territory of Wisconsin must pass, appears to render a strict and literal conformity with the directions contained in the act of Congress establishing the same impossible: and, whereas, the general intent of said act, it is presumed, can be attained without much difficulty; if said line be immediately marked and described,"

and then continues the proposal of the state of Michigan. Apparently the public officials were well aware of the situation along this boundary line and that such information was based upon a *critical* examination of the topography of the country. This is the first indica-

tion of information as to the condition in this area. Secondly, the authorities must be presumed to have known of the official actions of the official government surveyor, Captain Cram, and the reports filed by him with Congress showing the situation in this area. The Burt survey referred to in the complaint moreover specifically marked the boundary as understood by Congress.

The enabling act of Wisconsin again specifically called attention to the construction that Congress placed upon this boundary, and this construction is peculiarly significant when it is considered that Congress at that time had before it both reports of Captain Cram, his recommendations with reference to more clearly establishing the boundary, and the fact that Congress took great care in removing doubt as to the only remaining part of the boundary about which any dispute might arise, that is, the islands in the Menomonee River.

Thereafter, the Michigan authorities, in their constitutional convention of 1850, adopted almost the exact wording of the Wisconsin boundary. We say that this was done with absolute knowledge of the fact, for the Michigan authorities had the resolutions of the earlier general assembly showing that a critical examination of the topography of this country had been made. They had before them the surveys made by Captain Cram, the survey and boundary markings made by Burt; they had before them the enabling act of the state of Wisconsin, and finally, they had the Wisconsin Act of Statehood of 1848, whereby Wisconsin became a state. This knowledge of the exact effect of the investigations made by Congress with reference to this boundary in general may best be illustrated

by the fact that the Michigan boundary line left out the words "as marked upon the survey made by Captain Cram", apparently for the reason that the survey of Captain Cram had become merged into the survey of Burt, which survey was not only a record of a survey but one actually laid out on the ground by means of permanent monuments, and for that reason, the reference to Cram's survey was apparently useless and unnecessary and was so considered by the members of the constitutional convention of 1850.

The familiarity of the public authorities of Michigan with the exact situation existing with reference to this boundary line is clearly established when it is considered that Dr. Houghton, State Geologist of Michigan in 1840 accompanied Captain Cram on his first surveying expedition. House Miscellaneous Documents, First Session, 52nd Congress, Vol. 53, page 28, wherein it was said:

> "Historically considered, the exploration of this region commenced in the year 1840 when Dr. Houghton, as Commissioner of the State of Michigan, accompanied Captain Cram, the State Topographical Engineer, who was then surveying the Menomonee and Montreal Rivers."

SECONDARY PROPOSITIONS

The Montreal River intended by Congress as the boundary is the one designated in plaintiff's complaint as the EAST *branch*

The plaintiff's complaint alleges that the westerly branch of the Montreal River is the main branch of the Montreal River, and for that reason should be the boundary line in place of the so-called east branch. This proposition is founded again upon a survey and

investigation made in 1919. If this theory were adopted, the course of the boundary would be entirely different than that originally contemplated by Congress, and would make the boundary very irregular because the westerly branch of the Montreal River follows a more westerly course than the so-called easterly branch (see Exhibit E of bill of complaint). Again, Captain Burt made a very careful examination of the various rivers and the tributaries of the Montreal River and selected the present so-called easterly branch as the Montreal River. As between a conclusion as to the proper river to form the boundary made at or about the time the boundary was established and one now claiming that the volume of water in some other branch is greater than in the branch forming the present boundary, it is quite apparent that the long established and recognized stream should be adopted as the boundary intended by Congress.

Island Lake was never considered to be one of the Lakes of the Desert

This proposition follows from what has been said with reference to which is the proper Montreal River to be considered in this boundary. The other more apparent reason, however, is that the earlier maps do not include this lake, and plaintiff's Exhibit E very clearly shows the great distance between Lac Vieux Desert, the lake commonly and generally known for a hundred years as Lac Vieux Desert. This fact of itself makes it improbable that Congress ever considered Island Lake or ever knew of it. Moreover, Exhibit A relied upon in plaintiff's complaint shows that the lakes considered by Congress as the Lakes of the Desert were

The above map clearly shows that Congress intended the east branch of the Montreal River, and had but one Lake of the Desert in mind. Note this map shows the west branch as a large tributary rising in a lake. It was this map that Congress had before it and not Plaintiff's Exhibit "A."

very close together and could not possibly include a lake at the distance that Island Lake is from the main Lake of the Desert. Moreover, Congress, in referring to this boundary, did not refer to the Lakes of the Desert, even though, as counsel says, they had before them the map showing a group of lakes, but it continually referred to *the* Lake of the Desert. The maps submitted with this brief clearly show that there was at that time, and always has been, one Lake of the Desert, just as is indicated in Exhibit E to plaintiff's complaint herein, and as is indicated by the report of Captain Cram to Congress after his first survey, when he refers to Lac Vieux Desert as being the principal head of the Wisconsin River. (Senate Document 170, supra, p. 4.)

Another insuperable obstacle to plaintiff's theory that Island Lake was the lake contemplated by Congress is the fact that Island Lake in all the earlier maps is represented, not as being the source of the Montreal River, but as being the source of the Gogogashugun River, and that only recently has this river been named the West Branch of the Montreal River. That being true, if Congress had intended to adopt this river as the boundary, it would have mentioned it as the particular river, and would not have referred to it as the Montreal River.

The Menomonee River boundary

Apparently no explanation is given for the failure of Michigan to assert claim to the islands of this river, in spite of the fact that Congress had specifically provided that certain islands should go to Wisconsin and certain islands should go to Michigan. Moreover, the action of Wisconsin in adopting this construction of the boundary

did not seem to influence Michigan, and knowing that Wisconsin had adopted the boundary as suggested to it by Congress, Michigan in 1850, two years after the constitution of Wisconsin was adopted, adopted a boundary line exactly identical with the Wisconsin line, and while it did not expressly say it adopted the construction placed upon that line by Congress, it in no way dissented from such construction. After that time, as is stated in plaintiff's complaint, Wisconsin exercised uninterrupted sovereignty over the islands in question. Surely lack of knowledge or information as to the exact situation cannot be successfully set up to excuse the delay in bringing an action to assert its claim to any of these islands. It cannot, at least, overcome the positive action of the people of Michigan in adopting the line without dissent, knowing, as it must be held to have known, that Wisconsin was to have the islands below Quinnesec Falls and Michigan was to have the islands above Quinnesec Falls. (Wisconsin Enabling Act, p. 18.)

The Green Bay boundary

No apparent excuse is offered to the failure to assert claim to the islands now claimed in this state throughout the period between 1836 and 1923, except the general allegation of lack of knowledge. Yet, certainly, the region of Green Bay could not have been the wild country attempted to be depicted in plaintiff's complaint, when Congress, as early as 1836, referred to a usual ship channel, and plaintiff's complaint is founded upon the proposition that there was at that time a usual ship channel. In order to have had a usual ship channel, there must have been trade going on within Green Bay, and inhabitants there who were trading with the out-

side worlds. It is common knowledge that this was one of the common highways leading to the Mississippi River by way of the Fox and the Wisconsin rivers, and for that reason, it is, of course, very apparent that this region was well known and the exact situation and location of the various islands has been known to Michigan ever since the time the boundary line was first adopted. That being true, clearly the failure to bring this suit throughout this time cannot be excused because of lack of knowledge or information. Moreover, all of the early maps indicate familiarity with the exact location of the various islands.

The "most usual ship channel" means best or main channel

The claim of Michigan is based upon the proposition that the usual ship channel at that time lead through Death's Door, a statement which of itself rather negatives this assertion, for the reason that Death's Door apparently was given rather the name of a dangerous passage and one not ordinarily resorted to, and this fact becomes more apparent when we find that as early as 1837 Congress established a lighthouse on the northerly point of Pottawatamie Island (4 Stats. at L. 721), the extreme north point of the Wisconsin north point of land under Wisconsin's jurisdiction. The fact that this lighthouse, which was one of the first lighthouses located in this region, was placed at this point rather than at Death's Door is the best indication as to where Congress considered the most usual ship channel to have been.

Moreover, the report of Captain Cram again throws light upon the proper construction to be placed upon

the term "usual ship channel", when he adopts the theory of the instructions submitted to him, that usual ship channel should be construed to be the best ship channel for the reasons indicated in his report. This recommendation, together with the fact that Congress also used the term "*main* ship channel" in establishing the boundary line for Wisconsin Territory in 1836, evinces an intention on the part of Congress to refer to the best or main channel and indicates that Congress considered that this channel was also the most usual ship channel. This fact, together with the continued recognition that the boundary line did not pass through Death's Door, but passed around Washington Island and Pottawatamie Island throughout this period of time, indicates that public officials as well as people living in that part of Michigan all construed this definition of the boundary the same way as did Captain Cram.

MOTION TO DISMISS DOES NOT ADMIT ALLEGATIONS CONTRADICTED BY PUBLIC RECORDS OF WHICH THE COURT WILL TAKE JUDICIAL NOTICE

The foregoing discrepancies are pointed out at the outset in order that it may be fully understood that the fundamental propositions of plaintiff's complaint are entirely contradicted by the public records in existence at all times since the creation of the boundaries involved in this suit. Within familiar rules of this court, a motion to dismiss does not admit a false allegation concerning a fact of which the court will take judicial notice. 2 Foster, Federal Practice, 1831, sec. 366-B; *Pierce Oil Corporation v. Hope*, 248 U. S. 498;

Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244, 252; *Wilson v. Gaines*, 109 U. S. 417; *Ross v. Ft. Wayne*, 63 Fed. 466.

MOTION TO DISMISS PROPER REMEDY WHERE COMPLAINT AND FACTS OF WHICH THE COURT TAKES JUDICIAL NOTICE CONCLUSIVELY SHOW NO CAUSE OF ACTION EXISTS

Before calling the court's attention to the various public records establishing acquiescence in and acceptance of the boundary line as claimed by Wisconsin, the question may be asked, "Can this defense be raised by motion to dismiss?" The plaintiff contends that it can, and that such motion should dispose of the proceeding. This being a proceeding in equity, the rules of equity practice should prevail, and the demurrer being abolished by Rule 29 and the motion to dismiss taking the place of a demurrer in equity practice, it must follow that objections going to the sufficiency of the complaint must be raised by motion. This seems to be the rule of the federal court. *Alexander v. Fidelity Trust Co.* (1914), 215 Fed. 791, at 794. The motion to dismiss seems also to have been a proper proceeding even before the adoption of the new equity rule, for as early as 1838, in the case of *Rhode Island v. Massachusetts*, 12 Pet. 657, at 668, a motion was made to dismiss a complaint in a boundary line suit based upon similar propositions, and one of the grounds argued was very similar to that here contended for. See page 680. The court assumed that, had proper showing been made of the

contentions there made, the remedy asked for would have been granted. (p. 734.)

> "An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or a State, is and shall be."

Again, at page 735:

> "This however, is not a case where there is an issue on original boundary; the defendant does not rest on that fact, but puts in a plea setting up an agreement or compact of boundary between the parties while colonies, and the actual establishment of a line agreed on, run, marked, and ratified by both colonies, long possession, and a right by prescription to all the territory north of such line. This presents a case of an agreement on one side, alleged to be conclusive upon every matter complained of in the bill; on the other, to be invalid for the reasons alleged. If this matter of the plea is sufficient in law, and true in fact, it ends the cause; if not so in both respects, then the parties are thrown back on their original rights, according to their respective claims to the territory in question; by charters, or purchase from the Indians. If, then, we can act at all on the case, we must, on this state of the pleadings, decide on the legal sufficiency of the plea, if true, as on a demurrer to it; next, on the truth of its averments; and then decide whether it bars the complaint of the plaintiff, and all relief; if it does not, then we must ascertain the fact on which the whole controversy turns. In the first aspect of the case, it presents a question of the most common and undoubted jurisdiction of a court of equity; an agreement which the defendant sets up as conclusive to bar all relief, and the plaintiff asks to be declared void, on grounds of the most clear and appropriate cognizance in equity, and not cognizable in a court of law. A false representation made by one party, confided in by the other, as to a fact on which the whole cause depends, the execution of the agree-

ment, and all proceedings under it, founded on a mistaken belief of the truth of the fact represented. We must, therefore, do something in the cause; unless the defendants have, in their objections, made out this to be an exception to the usual course of equity, in its action on questions of boundary."

It has also been held that in passing upon questions raised by motions, the court will take judicial notice of public records, etc., and will consider such records in connection with the pleadings in order to determine the sufficiency of such pleadings. 2 Foster, Federal Practice, 1831, sec. 366-B.

Moreover, the object of the motion being identical with a demurrer, the rule as to demurrers should also be followed; that is, that length of time or laches may be a proper ground for demurrer. 2 Foster, Federal Practice, 1834, sec. 367.

SCOPE OF JUDICIAL NOTICE AS TO HISTORICAL FACTS

It appearing then that a motion is the proper remedy, it becomes necessary, in considering the application of the law to the facts in hand, to advert to the principles of judicial notice and the scope of judicial notice. The question now before this court, by its nature, necessarily involves historical data. The question being one of boundary and of acquiescence in the exercise of jurisdiction and the exercise of jurisdiction of respective sovereign states over a territory now in dispute raises propositions which are susceptible of proof only by documentary and other evidence of a similar nature. Facts to be proved upon argument of this motion are the acquiescence by the State of Michigan in the

exercise of jurisdiction over the territory now covered by the State of Wisconsin and the recognition by the United States government of the sovereignty of Wisconsin. These facts all call for evidence as to what the parties believe and how the parties have acted, and such evidence consists of maps and manuscripts and the like. No issue as to the truth or untruth of the allegations as to a mistake in the survey of the boundary line is raised. Maps, documents, recorded conveyances, etc., are useful insofar as they are shown to be products of one or the other party, and as they evidence acquiescence and knowledge of the boundary. For that reason, this court should take judicial notice of all such evidence that is to any extent matter of history, and to those documents and maps, which by their surroundings and in themselves show the validity of their issue.

In the nature of things, the scope of judicial notice of the *existence* of maps and documents is much broader than the scope of judicial notice of the facts which those maps and documents tend to prove. Whether or not a court will take judicial notice of a matter of fact is largely discretionary and depends upon the character of the case and the circumstances connected with it.

Waters-Pierce Oil Company v. DeSelms, 212 U. S. 159;

Hunter v. N. Y. etc. R. R. Co., 116 N. Y. 615.

Documents which can be found by reference to any library would seem naturally to be subjects, the existence and validity of issue of which this court should judicially notice.

For the most part, the sources of information upon which we rely and to which we direct the attention of

the court are the documents of the House of Representatives and of the Senate, more particularly the reports of the various major departments of the government as set forth in such documents. Primarily, the sources of information so referred to are. the reports of the Secretary of War, containing the reports of the Chief of Engineers; the reports of the Secretary of the Interior, containing the report of the Surveyor General; the report of the Treasury Department, embodying the report of the Light-House-Board. As to all of these, we have no slightest question but that they are properly before the court as evidence of the very highest character and standing. Such practice is sanctioned in *Tempel v. United States,* 248 U. S. 121, at 130, where it appears that the court examined the engineers' reports for a period of fifteen years and certain private acts of Congress under the theory that it might judicially notice the same. Such documents were examined without discussion by the court in *Alaska Pacific Fisheries v. United States,* 248 U. S. 78, 86, 89, and *International News Service v. Associated Press,* 248 U. S. 215, at 248.

Likewise in *The Paquete Habana,* 175 U. S. 677, at 712, the Bureau of Navigation Report of 1898 appears to have been judicially noticed. Reference to maps and charts, not all of them official, is sanctioned in *Moore v. McGuire,* 205 U. S. 214, at 224, and private acts of the State of Mississippi are referred to. The case of *Trenier v. Stewart,* 101 U. S. 797, illustrates the extent to which the court may propery go in judicially noticing general historical works and historical research. The state court had there said *(Trenier v. Stewart,* 55 Ala. 458, at 465): "The most satisfactory and important evidence on the subject has been entirely overlooked," and reference was then made to Pickett's History of Ala-

bama, and Bancroft's History of the United States, and the court determined the case (see p. 468) "by the documentary evidence in it considered in view of the historical and geographical facts of which the court must take notice." Its action in doing so seems to have been expressly sanctioned by this court at page 810 of the opinion, in these words:

> "Most of these views are much strengthened by historical researches of the court below."

Certain acts of the legislature of the State of Michigan, to which we refer, are of the same nature as these acts of Congress, and the same principles with regard to judicial notice apply. In view of the purpose for which these acts are introduced, it would seem that no distinction could be made between private acts of the legislatures of the two states involved and public acts of those states, the only question in either case being whether in fact such an exactment existed.

THE EXACT LINE MARKING WISCONSIN'S SOVEREIGNTY AS EXERCISED SINCE 1836 IS NOT IN DISPUTE IN THIS CASE

Before approaching a discussion of the evidence properly before the court at this time, it is well to call the court's attention to the exact issue presented by plaintiff's complaint so far as this boundary is concerned.

Michigan's complaint recognizes the fact that Wisconsin has exercised uninterrupted, undisturbed and undisputed sovereignty over the entire territory claimed by Michigan in this proceeding throughout the period from 1836 to 1907 and an undisturbed and uninterrupted sov-

ereignty since that time. The boundary marking the limits of this sovereignty so exercised is clear and undisputed, and no issue is raised about it in plaintiff's complaint. Nor is any question raised that any doubt exists or will arise as to the boundary as claimed by Wisconsin should Wisconsin be right in this claim. That being true, if it appears from the records, to which we call the court's attention, that Michigan's claim is not well founded, or if it appears from an examination of the records that no matter what Michigan's claims might have been when the boundary was first marked, long acquiescence in the boundary as claimed by Wisconsin prevents Michigan from now asserting such rights. A decision favorable to Wisconsin on either proposition disposes of Michigan's claim and of this lawsuit. *Rhode Island v. Massachusetts,* 12 Pet. 657, at 734 and 735. For this reason, the purpose of this motion is to present to the court the records which we consider so clearly sustain Wisconsin's claim to the disputed territory and to the boundary line which has been recognized by all parties for nearly one hundred years, that it would be unfair and unjust to put the State of Wisconsin to the expense of a trial in order to present additional evidence which would only be cumulative and would not be of the dignity of the records herein referred to.

THE BOUNDARY AS CLAIMED BY WISCONSIN HAS BEEN UNIVERSALLY RECOGNIZED

In order to sustain this motion, it is now proposed to submit to the court the various official acts of the government of the United States and the governments of

the states of Wisconsin and Michigan, indicating on the part of the United States the construction placed upon the boundary line as originally defined by the first act of Congress and as later more specifically defined by the Wisconsin Enabling Act, and as far as the states of Wisconsin and Michigan are concerned, indicating a recognition of such boundary and an acquiescence in the action of Congress with reference thereto.

The appendix accompanying the brief is submitted to more clearly call the court's attention to the general and universal understanding as to the exact limits of Wisconsin's jurisdiction throughout the period here involved, and to present concretely the common understanding of the various governments with reference to the extent of Wisconsin's territorial limits.

RECOGNITION BY THE UNITED STATES

The bill of complaint itself admits that the Federal Government has ever recognized Wisconsin's sovereignty over the territory in dispute. On page 37 of the bill, the following passage appears:

> "Many other important islands are included in the government survey of the State of Wisconsin, but are located on the Michigan side of the main channel of that river."

Again on pages 40 and 41:

> "That the State of Michigan has been prevented from levying and collecting taxes on said land, not only because of the possession and civil jurisdiction thereof exercised by the State of Wisconsin, but because the government surveys thereof, made by the officers and agents of the government of the United States, were, unlawfully and without warrant so made and recorded as to make it appear they are a part of the State of Wisconsin

and they are not so made as to indicate a proper description thereof for taxation or other purposes within the State of Michigan, notwithstanding the fact that the Government of the United States had, before the making of said surveys, granted said territory to the State of Michigan and has never granted the same to the State of Wisconsin."

The bill of complaint states that officials of the United States Government "have made representations to the effect that said boundary had been settled by Congress" (favorable to the construction of Wisconsin) (41). As an instance of such a representation, the bill quotes from a letter written by Brigadier General McKenzie, Chief of the Engineer Corps, United States Army, to Russell A. Alger, in response to an inquiry:

> "'A perusal of these documents will show that Captain Cram found it impossible to lay down a line as called for by the Act of June 15, 1836; that in order to present the situation for the assistance of Congress in the further legislation necessary to define the line, he explored, surveyed and mapped hundreds of miles of the region, then a wilderness inhabited by Indians suspicious of his operations, and whom he found it necessary to pacify; that he made suggestions for the solution of the difficulty which were largely adopted by Congress, in its further definition of the boundary, found in the Act of August 5, 1846; and that portion of the line established by Mr. Burt was only that section, about 64 miles in length, which Captain Cram had reported as requiring further definition, and which Congress did define in the Act of August 6, 1846, prescribing that it would run to a point "as marked upon the survey of Captain Cram."'"

The records of Congress and the reports of heads of the various executive departments are replete with material showing a governmental recognition of Wisconsin's sovereignty over the territory in question. Without ex-

ception officials of the United States Government have, in dealing with problems where the location of the boundary line was involved, treated the disputed territory as included within the boundaries of Wisconsin. A complete examination of all governmental records dealing in any way with the problem does not even raise an issue as to sovereignty. At no time have Michigan's claims even been recognized by the officials of the United States government. House Misc. Doc. No. 41, Vol. 16, 48th Congress, 2d Session.

The statement appears:

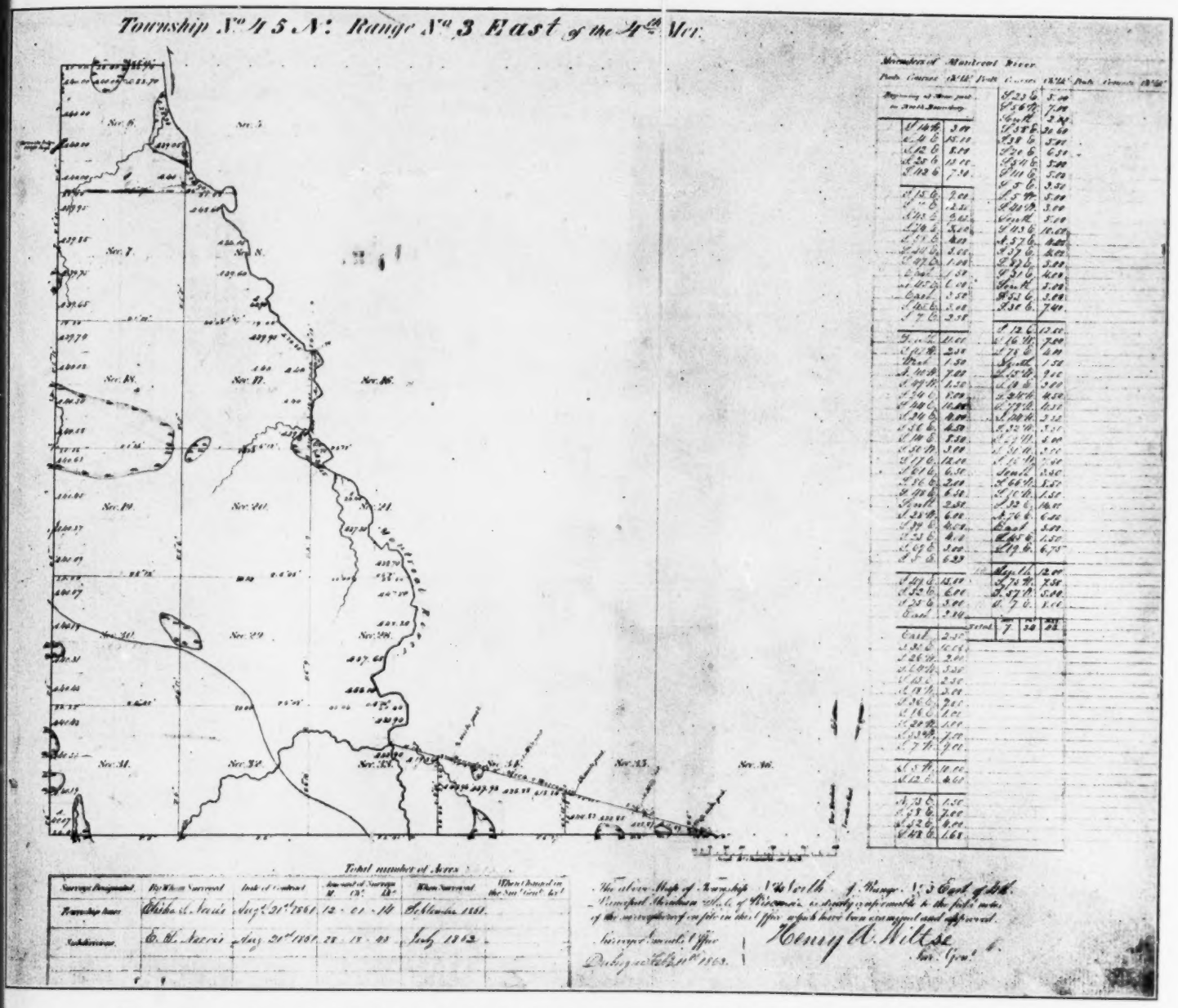
> "The above boundaries (referring to the boundaries as set out in Michigan's enabling act) remain unchanged."

Again,

> "The straight parts of the boundary were surveyed and marked in 1847, from a point where Balsam River and Pine River unite to form the Montreal, thence south 74°, 27′ East, to the Lake of the Desert, a distance of fifty miles, 67 chains and 6 links."

The same is true of the most recent official publication upon boundaries. In Bulletin 226, United States Geological Survey, entitled, "The Boundaries of the United States and the Several States and Territories," and issued in 1923, similar statements appear, one of which is:

> "The boundary between Michigan and Wisconsin, between the sources of Brule and Montreal Rivers was run and marked in 1847" (p. 121).



The government survey indicates most clearly the exact pointat which Cram's propcsed line touches the east branch of the Montreal River, and actually shows such posts on the boundary line at this early date.

UNITED STATES LAND OFFICE SURVEY

The Montreal River

All of the United States Land Office township maps made in pursuance of government surveys indicate the boundary line as it was originally laid down and as it is now claimed by Wisconsin. In fact, Exhibit E of the State of Michigan, a map entitled "Michigan–Wisconsin Boundary, Lake Superior to Green Bay" and attached to the bill of complaint, brings this out clearly. Wisconsin section lines all run to the boundary line as it is claimed by Wisconsin, including Chambers, Washington and Rock Islands in Green Bay. On the other hand, Michigan's section lines run only to this line and no further. The field notes of T. 45 N, R. 3 E, indicate clearly that mile posts were in along the boundary in July, 1862. It is also apparent from this plat that the east fork was known only as the Montreal River. The west branch, which Michigan alleges is the Montreal River, is upon this government map given no name and does not appear to be meandered. It is not even named in the surveyor's notes.

Islands of Menomonee

All of the islands in the Menomonee River claimed by Wisconsin, insofar as such islands have been surveyed, appear on the land office maps of Wisconsin, and, with the exception of one such island, none of them appear upon land office maps of Michigan. The plat of T. 38 N, R. 28 W shows a large island in the Menomonee River and it is expressly marked upon the map "Grand Island" (Wisconsin) and appears to be

surveyed. T. 38 N, R. 28 W is a section adjoining the Menomonee River *below* Quinnesec Falls. It is significant that this island, and the whole of this island, is adjudged to Wisconsin by the surveyor in 1848, and that this survey is approved by the Surveyor General, only two years later, and especially when the main channel of the Menomonee River, according to such survey, appears to run along the west side of the island rather than the east. None of the islands in the Menomonee and Brule Rivers above Quinnesec Falls appear upon the land office plat maps as Wisconsin islands. As has been stated, Chambers Island, Washington Island, Rock Island, and the Strawberry Islands, as well as Hog Island, have all been designated upon government surveys as Wisconsin territory.

OTHER OFFICIAL SURVEYS

The first official recognition of Wisconsin's sovereignty over the disputed strip, or rather of Michigan's lack of sovereignty over such strip, appeared in the reports of Capt. Cram, who surveyed and mapped the regions in question under the description of the boundary contained in the enabling act of Michigan. Recognition again appeared in the survey by Judge Burt and in the maps drawn by him and incorporated in Senate Document No. 2, 30th Congress, 1st Session, 1847.

Surveys of land in the Michigan peninsula were begun in 1844 and surveys of public lands in Wisconsin shortly thereafter.

In these early surveys the line as it was run by Capt. Cram, and as it has ever since remained, was treated as the true boundary line, and maps accompanying the reports of the surveyors general of Iowa and showing

Township N.° 33 N., Range N.° 23 East, 4th Mer.

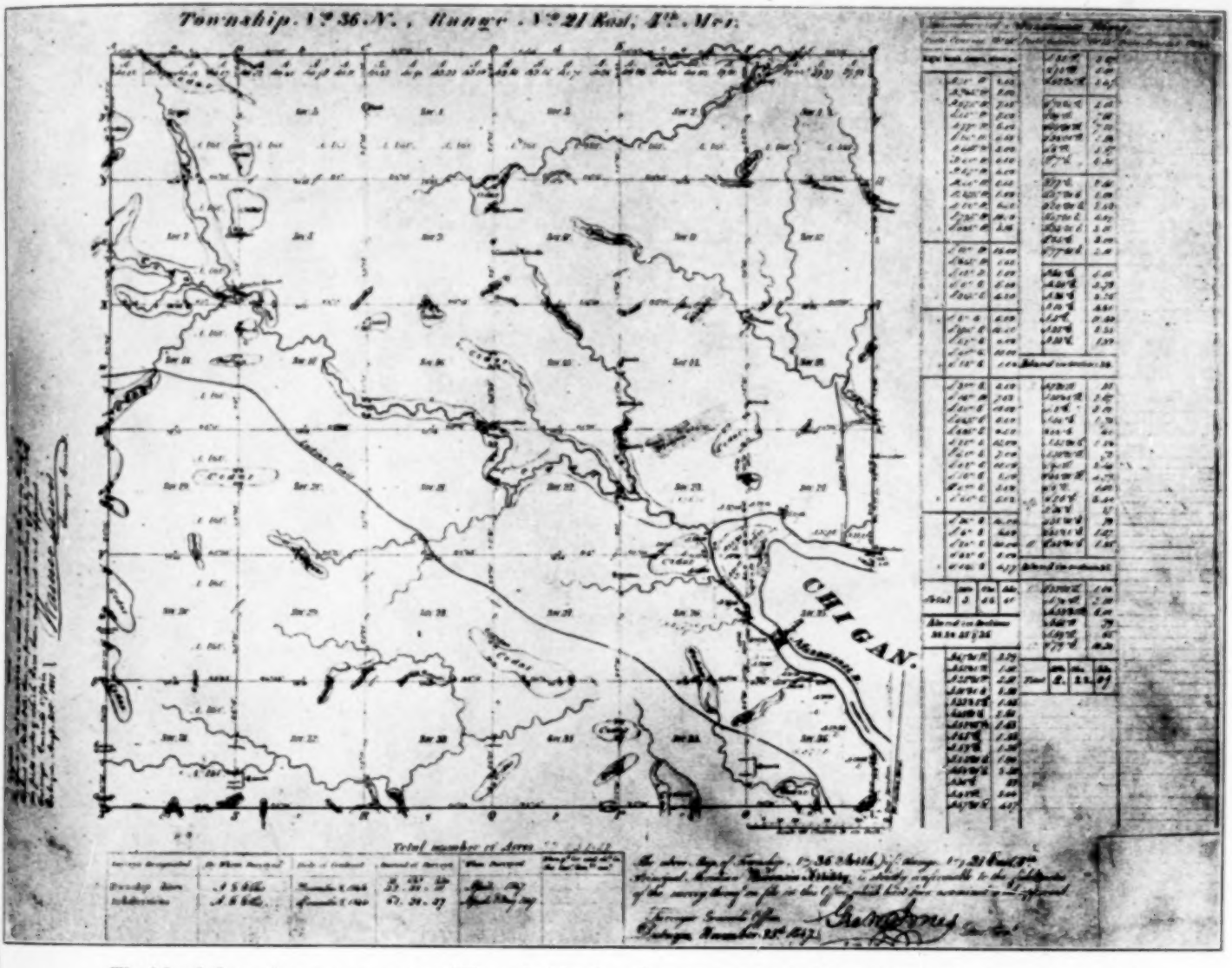
The blanks on outlines A 2,3,4 W 32 W 33 W are a correct representation of the Survey thereof by Richard A. Bell Esq. the Surveyor in authorities of July 25th 1904, the field notes of which have been examined and approved.

Surveyor Generals Office
Dubuque Sept. 21st 1904

Wm. Saxon
Surv. Genl.

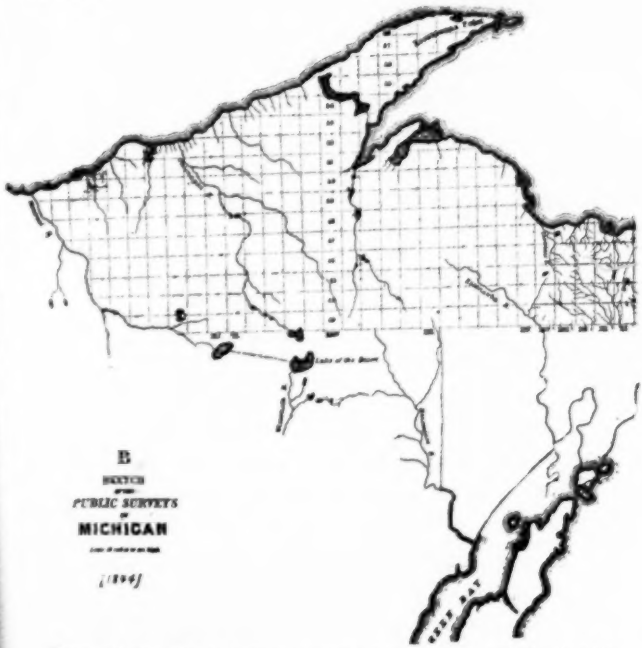
Meanders of Wisconsin River

From	Courses	Dist Lks	From	Courses	Dist Lks	From	Courses	Dist Lks
Right bank, up stream.								



The island shown hereon appears as a Wisconsin island on the government survey, although the channel would seem the left bank of the river.

the progress of public surveys indicate the Cram and the Burt line as the boundary line, that is: the boundary line is made to run up the east branch of the Montreal River to the fork of the Pine and Balsam Rivers, from there in a straight line to Lac Vieux Desert, from Lac Vieux Desert to Lake Brule, then down the Menomonee River to its mouth and out of Green Bay. Both Washington and Rock Islands appear upon such maps as Wisconsin territory. The maps indicate a recognition of sovereignty in Wisconsin over all of the territory in question except the islands in the Menomonee River which the maps are not sufficiently detailed to show.



One of the first government surveys of public lands in the upper peninsula, 1844.

Public surveys of the two states progressed very rapidly from this early date and lands in the regions surveyed were sold and granted to mining companies and individuals from the very beginning.

SURVEYOR GENERAL'S MAPS

Maps accompanied nearly all of the early reports of the surveyors general as the work progressed, and it is to be noted that *every* map submitted by the surveyor general to the general land office, accompanying his report and incorporated in the report of the Secretary of the Interior to Congress, indicates the boundary line as Wisconsin claims it to be and as it has always been established. This includes for most years a map of Michigan, a map of Wisconsin, and a map of the United States, and comprises a total of more than thirty maps. Some of the earlier of these maps have been reproduced and are incorporated in the appendix.

REPORTS OF SURVEYOR GENERAL

The reports of the surveyor general also indicate a recognition of this line as the true line. Few passages occur which throw light upon this subject but those few indicate unequivocally the view of the general land office, that department of the Federal government which, more than any other, was acquainted with the geography of the country, familiar with the acts of Congress involved, and most frequently called upon to determine its action according to the location of the boundary line.

In Senate Document No. 2, First Session, 30th Congress, 1847–8, at p. 75, the following statement of the surveyor general appears:

"William A. Burt, esq., under a contract dated the 27th of April last, has completed the survey of so much of the boundary line between Michigan and Wisconsin as lies between the source of Brule river and the source of the Montreal river, as defined by the 'Act to enable the people of Wisconsin Territory to form a constitution and State government, and for the admission of such State into the Union,' approved on the 6th of August, 1846, and his returns are expected in time to have a copy of his field notes and report thereon reach you before the meeting of Congress. A copy of his map of that boundary, showing the connexion of the surveys in Michigan therewith, on a scale of eight miles to an inch accompanies this report."

Again, on page 85:

"Anxious to facilicate the important examinations contemplated in the appointment of Dr. D. D. Owen by the Treasury Department, and conscious that a detailed geological examination could connect with none other than a subdivision survey, I regarded the earliest possible execution of the base and township lines, put under contract on the 20th and 22d of May last, as not only indispensable to the commencement of the geological operations, but equally in obedience to that portion of your instructions of the 22d of April last, which had reference to this subject. The fourth principal meridian and third correction parallel formed the basis of the surveys within the said district, and were to be established before even the survey of township lines could commence. Upon this service, therefore, a deputy was detailed, whose character for perseverance and competency insured not only the earliest but most accurate survey thereof. Still, so abundant and unforseen were the difficulties opposing the execution of those lines—which, from the limited knowledge of that country heretofore had, might, with propriety, be termed explorations—and so unfavorable was the season on account of rains and almost continually cloudy weather, that their completion

was unavoidably delayed nearly a month longer than was at first anticipated. Every exertion, however, has been made, not only in the surveys above named, but, also, in those put under contract at a more recent date to accommodate their execution to the geological examinations; and, if this object shall, in some instances, not have been attained, it is from causes that it was totally out of my power to avert or control."

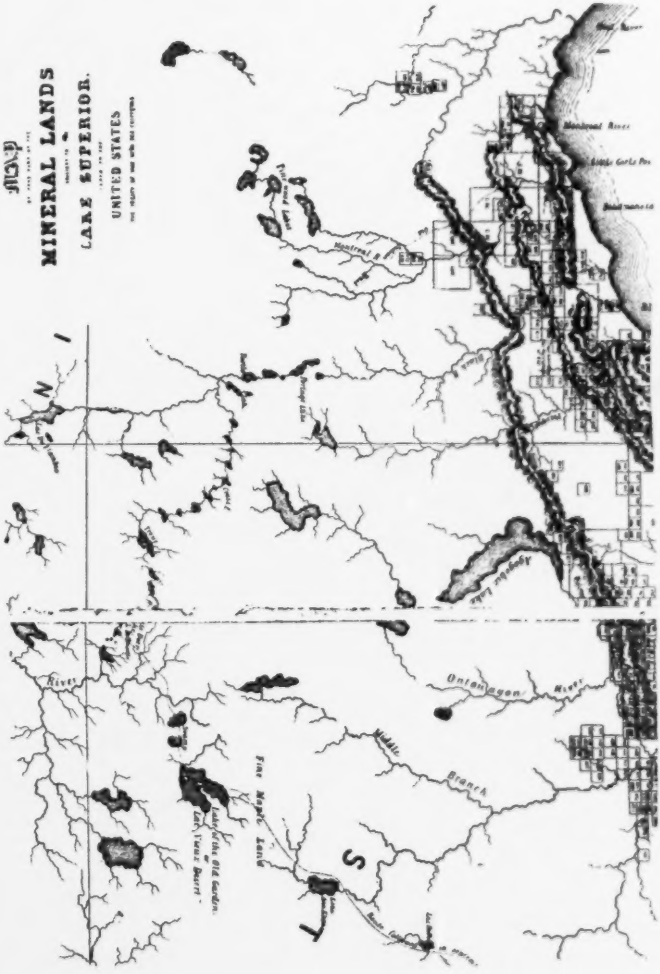
Among the government departments, that department interested in geological surveys of the new regions seems quite as clearly to have recognized the Cram line as the dividing line between Wisconsin and Michigan, and Washington and Rock Islands as subject to Wisconsin's sovereignty.

GEOLOGICAL SURVEYS

A report on the mineral lands of Lake Superior seems to be the earliest of a series of close and careful geological surveys of this region. In Senate Document No. 175, 28th Congress, 2d Session, 1844, a report of John Stockton, Superintendent of the mineral lands on Lake Superior, is printed, together with a map of such mineral lands, drawn by him. The map is quite clear; it shows the Montreal River with a course corresponding substantially to its actual course and heading apparently in swamps some considerable distance from Lac Vieux Desert. The map clearly shows Lac Vieux Desert as the lake that is so named today, and the river there designated as the Montreal River is just as obviously the east branch of the present Montreal River. On page 20 of his report, Stockton says:

"The Montreal River has a fall of fifty feet over a steep and rugged precipice near its embouchure into the lake, and, from the shallowness

of the waters of its bar, admits of only small boats and canoes. This stream was originally supposed to head in Lac Vieux Desert—a small but beautiful lake, which has since been found to discharge its waters into the Menomonee."



In Executive Document, No. 5, First Session, 31st Congress, 1849–50, the results of a detailed survey of the country between Portage Lake and the Montreal River by J. W. Foster and J. D. Whitney, together with maps of that district, are given. The map of the district shows the Montreal River as the boundary line between the two states and it is the eastern branch of the Montreal River that is designated as the Montreal River. The report refers to the great number of lakes in this district.

> "The number of lakes is very considerable; they are, however, most numerous near the southern boundary of the district—so much so, that Judge Burt crossed about fifty of them in running the boundary line between Michigan and Wisconsin" (650).

On page 719 the writer states:

> "*July* 19—Remained in camp waiting for Judge Burt, whom we expect every moment. Copied map of district between Montreal and Ontonagon. Messrs. Randolph and other gentlemen passed up the river. In the evening our boat returned from the mouth of the river, bringing a letter from Dr. Jackson, who is making a picturesque tour round the lake on board the Julia Palmer."

Again,

> "*July* 22—Austin Burt came in this morning, and John Burt, with their parties, in the afternoon; so that we were in the midst of a pretty large assemblage, including some of Mr. Higgins's packmen. Judge Burt gave us much information with regard to the country he had traversed this season and the last. Below the trap range, which extends along north of the Ontonagon, the rocks are rarely to be seen cropping out. All the parties described the features of their last lines as the same, namely: low trap knobs rising at considerable distances from each other, and destitute of mineral contents. On the boundary line between the forks of the Montreal and Lac Vieux desert,

GEOLOGICAL MAP
of the
LAKE SUPERIOR DISTRICT

W. S. T. A. T. E. S. O. F.

POINT DETOUR

BARK POINT

CHARLEVOIX BAY

Judge Burt found the rock in place only twice; it was sienite. The Judge found the most interesting country, last year, marked on the map as trap and hornblende slates. He described the iron region as one of great interest."

Reference to Lac Vieux Desert and the famous trail was found on page 737.

"*September* 17—Packed up what things we could carry, and left mouth of the river for the cabins of the Montreal River Mining Company, distant about three miles. The trail is the great one by which the Indians of Lac Vieux Desert and some from the head-waters of Chippewa river go to the payment at La Pointe. The road passes over a high hill of conglomerate, covered with large white birch and cedar. Rain continued all day, and prevented all further explorations. Remained in the deserted cabin of the company.

"*September* 18—Spent the whole day with Mr. Bernard in exploring the bed of Montreal river, and measuring the width of the alternate beds of trap and sandstone, and drew plan of these interesting alternations of rock."

OWEN'S GEOLOGICAL REPORT (WISCONSIN)

In Senate Document No. 2 1st Session, 30th Congress, 1847–48, a preliminary report by Dr. D. D. Owen, U. S. Geologist for Wisconsin, upon the geological survey of Wisconsin and Iowa appears. He there states that a sub-corps is operating in the vicinity of the Montreal River and that geological observations are being made. He states that the geological character of the entire line will be known by the close of the season. His report shows clearly his knowledge of both the existence and the location of the boundary line, and the fact that for him the line is not in dispute.

In Executive Document No. 57, 1st Session, 30th Congress, 1847–48 appears Dr. Owen's report of his geological survey of the Chippewa land district. On page 52 of such report, he states:

> "During the few days' delay incident to these preparations, I hired a canoe and proceeded to the boundary line between Wisconsin and Michigan, where Montreal river empties into Lake Superior. The most interesting exposures lie in Dr. Jackson's district, on the east side of the river. I abstain from speaking of them here, as they will doubtless be described in his report.
>
> "The 4th principal meridian strikes the southern shore of Lake Superior, in Wisconsin, fourteen chains and seventeen links below the outlet of Montreal river. Just above this point are good sections of the superficial marls, sands, and drift deposites, which can be seen resting unconformably on the tilted strata of red sandstone, as shown on Pl. 20. These latter have a bearing of north 30° east, and are inclined at an angle of over 80° near the trap and 70° near the lake."

From page 85 to page 110 is a detailed report of the reconnoissance from the mouth of the Montreal River to Prairie du Chien. The account is set forth in diary form and shows the careful study made of the Montreal River. On page 88 the statement appears:

> "Two miles from Spruce river brought us to the crossing of the west fork of the Montreal river, where we concluded to camp."

Further down on the page appears this passage:

> "*September* 23—Montreal river is about twenty-five feet wide at this point, and three feet deep. It has been bridged in a rude manner by the engagés of the American Fur Company, who have, for many years, transported goods over this route to the small trading posts established among the Indians at Lac du Flambeau and other points in this direction. We crossed at 7 o'clock, and commenced

> ascending hills of slight elevation, apparently made up of granite boulders, until we reached a ridge one thousand and seventy-eight feet above the lake."

The statement that Indians have for years used this route, following substantially the east branch of the Montreal River, to transport furs and to transport goods between the small trading posts of the interior and Lake Superior is illuminating. This was not unknown country, but, on the contrary, was very familiar to the fur traders and trappers of this period. On page 92 a reference is found to Vieux Desert lake, obviously the lake established by Congress as a point in the boundary, and the lake now known as Lac Vieux Desert. Here again the reference is to an established land mark, a central point familiar to the Indians and the fur traders. Passages on pages 93, 94 and 96 bring this out even more clearly. A geological map of the Chippewa land district, accompanying Dr. Owen's reports, shows in detail the boundary line and this whole district. The boundary line is drawn upon such maps just as it is laid down today. It must be remembered that this report was made as early as 1847. Yet the map is very accurate. The ~~west~~ east branch of the Montreal River is designated as the Montreal River, and the ~~east~~ west branch thereof is named merely "The west branch."

About the same time that the Owen survey was being made in Wisconsin, Charles T. Jackson, Geological Surveyor of the mineral lands of the United States in Michigan, by his assistants Drs. Foster and Whitney, made a detailed geological survey of the upper peninsula. In his report in Senate Document, No. 2, found in the same

volume with the report of Dr. Owen mentioned above, at p. 175 he states:

> "Mr. Whitney and his sub-agents, Bernard and Barney, and his intelligent packman, Mr. Smith, deserve great credit for their perseverance under the most disheartening difficulties, in a thick wooded country, where progress was exceedingly difficult and slow, and the supply of provisions precarious. They have explored the Montreal river to its sources, * * *."

On page 22, a letter from Mr. Whitney to Dr. Jackson, printed in the same volume, Mr. Whitney says:

> "We thus passed over and obtained a general idea of the whole district between the Ontonagon and Montreal rivers, as far south as the boundary line, examining all the most important points within that area with as much care as possible. * * * We have thus included, within the district which we have examined, several townships which had been subdivided in 1846, by Messrs. Higgins & Hubbard, of which a geological map has already been furnished to the land office by these gentlemen. * * *"

All these reports show the utmost exploring activity in this region and indicate that there were many geological surveyors and linear surveyors and surveying parties on duty at this time. The reports, with their frequent records of meetings with other parties, show careful study of this region and, in every case, a recognition and acceptance of the boundary line as it was run by Capt. Cram. It is apparent that great care was used in the exploration of this country and that a remarkable amount of knowledge was obtained concerning it. These early surveyors, dealing with valuable mineral lands and facing the first rush of the mining companies to the wealth of the Superior mineral lands, must have been very careful not to make mistakes. The remarkable

unanimity of opinion, as shown by the numerous maps and the occasional references, indicate the common official belief concerning the boundary. The boundary was not marked out with sign posts, though we have referred to the few mile posts that appeared upon the line run from the head of the Montreal River to Lac Vieux Desert, and in view of this, the fact that not once does any doubt appear to exist in the minds of the numerous surveyors and geologists engaged in exploring the country in question and vitally interested in the exact location of the boundary is remarkable.

LATER SURVEYS AND REPORTS (VAN HISE)

Again in 1884, 85, and 86, a detailed survey of the geography of so much of this region as lay in Wisconsin was made by Charles R. Van Hise. His report is incorporated in House Misc. Doc. No. 342, 1st Session, 52d Congress, 1891–2, Vol. 52. On page 28 of that report, the following passage appears:

> "Historically considered, the exploration of this region commenced in the year 1840, when Dr. Houghton, as a commissioner of the State of Michigan, accompanied Capt. Cram, of the United States Topographical Engineers, who was then surveying the Menomonee and Montreal rivers."

Facing page 31, a detailed geological map of the Penokee district appears and upon such map the Montreal River and the west fork thereof, which is there called the Gogogashugun River, appear. Again, facing page 20, is a reproduction of Whittlesey's geological map of the same district, and the east branch of the Montreal River is there labelled the Montreal River. Facing page 136 appears yet another map of this district, and

there the east branch is again labelled the Montreal River, and also the Michigan-Wisconsin line. A map facing page 139 is to the same effect.

WATER POWER REPORT (MENOMONEE RIVER SECTION)

A report upon the water power of the United States indicates once again official recognition of Wisconsin's sovereignty over the territory in dispute. Such report appears in House Misc. Doc. No. 42, 2d Session, 47th Congress, 1882–83. On page 55 it is stated that only regions lying in Wisconsin were examined and that the instructions in pursuing the field work were to omit the area lying in Michigan in examining regions north of the lower Fox River system. The report is very detailed in so far as it relates to the Menomonee River and its tributaries. It is very evident that the boundary line as claimed by Wisconsin is considered and assumed to be the true boundary line. The region does not appear to be a wilderness as Michigan contends, but at this time was rapidly being settled. An Indian grist mill had been established a few miles above the mouth of the Menomonee River. A railroad line ran through Florence, a Wisconsin mining town, and there were supply stores. The region had been carefully explored by the Menomonee River Manufacturing Company, and the whole district was known and mapped.

Green Bay section

In Executive Documents, No. 236, 1st Session, 26th Congress, 1839–40, the statement appears:

> "Wiskonsin is a great country for mines, and were the channel of trade open these mines would

be worked to a greater extent and the materials would find their way to New York and other eastern cities, *the lake route being the most direct.*"

This passage shows beyond question that it was the lake route and not the land route that was used for the mineral trade, and that obviously was the predominant belief of the northwest at this time. An examination of the map of Green Bay shows beyond any question that the passage used in the lake route is the passage on the outside of Rock Island, and that the Port des Mortes passage narrower, and, as its name indicates, somewhat more dangerous, would involve an unnecessary detour.

Lighthouses indicate usual channel

Moreover, it is significant that a lighthouse was built by the Federal Government on Pottawatomie, or what is now Rock Island, in 1837, pursuant to Act of Congress, dated June 30, 1834, 4 Stats. at Large, 721. A lighthouse was built in the Port des Mortes passage pursuant to Act of Congress, dated August 14, 1848, 9 Stats. at Large, 321, but this was nearly fourteen years later. The inference is plain that it was the Rock Island and not the Port des Mortes passage that was most used at this time. Moreover, in an appropriation bill dated March 3, 1847, found in 9 Stats. at Large, 185, for the Pottawatomie lighthouse, it is stated that the lighthouse is to be situated "at the entrance to Green Bay in the territory of Wisconsin," and in the original act providing for the establishment of that lighthouse, it was provided that the lighthouse should be on Pottawatomie Island "at the entrance of Green Bay." This last affirmation that Pottawatomie Island was situated at the entrance to Green Bay is very significant. The act of

1848 providing for the Port des Mortes lighthouse expressly declares:

> "In Wisconsin—for a lighthouse to guide vessels through the passage from Lake Michigan to Green Bay, called Port des Mortes, $3,500."

It is clear that Congress thought both Washington and Rock Islands to be Wisconsin territory at this time, and this was only two years after Wisconsin's enabling act. The significance to be attached to the name of Port des Mortes has already been pointed out.

Main and usual channel used interchangeably

In passing, it should be noted that the territorial act of Wisconsin in describing Wisconsin's boundaries does not specify the most usual channel of Green Bay as does the enabling act of Michigan, but lays down the boundary as "the main channel of Green Bay." Congress did not mean to lay down any different boundary than that set forth in the enabling act of Michigan, and, therefore, the fact that these words were used shows beyond any question that by "the most usual channel" Congress meant "the main channel."

The map previously referred to, complainant's Exhibit E, moreover shows clearly the entire independence of Michigan and Wisconsin's section lines along the present boundary and gives some idea of the tremendous harm that would be done by any change placing Wisconsin land within the boundaries of Michigan.

WISCONSIN HAS EXERCISED UNINTERRUPTED SOVEREIGNTY

From its inception the state of Wisconsin has been in possession of the lands now claimed by Michigan and has taxed such lands and included them within its boundaries and city, town and village organization. The people of the disputed district have ever been amenable to Wisconsin laws, governed from the state capitol at Madison, and answerable to Wisconsin courts of justice. The disputed territory has been as much a part of Wisconsin and the inhabitants thereof as much her citizens as has been the case in any undisputed sections. All this appears from the bill of complaint and is admitted by Michigan to be the case.

On page 28 the bill reads:

> "* * * nevertheless, the State of Wisconsin has possessed itself of and exercised sovereignty over a large part of the waters of Green Bay that are within the grant to the State of Michigan and over numerous islands of said Green Bay within said grant to the State of Michigan, including Washington Island with a territory of about 15,000 acres or more, Chambers Island with a territory of over 3,000 acres, Plum Island, Strawberry Islands and numerous other valuable islands.
>
> "That the said proposed boundary of Wisconsin, except for the condition therein provided, did include in the State of Wisconsin a very large number of islands in the Menominee River that are within the grant to Michigan and a very large territory between the Brule Lake and the main channel of the Montreal River that are within the grant to Michigan, and the State of Wisconsin has taken possession thereof and claims sovereignty over the same and has excluded and continues to exclude the State of Michigan from her rights thereto."

A similar statement appears on page 37, and on page 40 this passage is found:

> "Wisconsin has for many years disregarded the true and rightful boundary as described in the Act of Congress of June 15th, 1836, providing statehood for Michigan, and does now disregard same, and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal River section, the Menominee River section, and Green Bay section of the disputed territory, aggregating approximately 255,000 acres, including extensive and valuable mineral rights, water powers, and other water rights and privileges, and has unlawfully taxed and still continues to unlawfully tax said property, and the taxes assessed thereon have been paid and continues to be paid to the State of Wisconsin, while of right the State of Michigan is entitled to levy and collect taxes thereon."

On page 37 of the bill of complaint it is stated that:

> "Wisconsin, by her constitution, claims the main channel of the Menominee River as its boundary."

This is incorrect in point of fact as clearly appears from the constitution of Wisconsin. No reference is made in the description of boundary contained therein to the islands in the Menomonee River, but sec. 1 of Art. II expressly provides:

> "It is hereby ordained and declared that the state of Wisconsin doth consent and accept of the boundaries prescribed in the act of congress entitled 'An act to enable the people of Wisconsin territory to form a constitution and state government, and for the admission of such state into the Union,' approved August sixth, one thousand eight hundred and forty-six * * *"

GEOLOGICAL SURVEYS AND REPORTS (WISCONSIN)

The Geology of Wisconsin, published in 1880, under direction of the Chief Geologist by the Commissioners of Public Printing, in accordance with legislative enactment, contains some valuable passages and illustrates Wisconsin's position very well as to the Montreal River section of the boundary line. Facing page 60 a map appears showing clearly the Montreal River. That territory to the east of the east branch of the river is labelled Michigan; that to the west thereof, Wisconsin. The west branch of the Montreal River is called the Gogogashugun River.

On page 64 the following passage appears:

> "The Montreal river crosses the range in the S. E. quarter of Sec. 2b, T. 46, R. 2 E., in quite a wide and shallow valley. On the west line of Sec. 24 the ridge is quite flat, having gentle slopes either way; the summit, near the southwest corner of the section, having a width of 400 paces, and rising to an altitude of 1,040 feet above Lake Superior. For half a mile northward, the descent is only 60 feet. All along the south line of Sec. 23 the ground is nearly level, not varying 40 feet. On the west line of Sec. 26, the top of the ridge is near the quarter-post, with an altitude of 1,060 feet; half a mile both north and south, the ground is only 90 feet lower. In the south half of Sec. 27, *the Gogogashugun, the main tributary of the Montreal, crosses to the northward in a narrow rock gorge, with steep hills on the west side and a much more gradual rise on the east.* Where it crosses the south line of Sec. 27, the Gogogashugun has an altitude of about 980 feet. West of this river, we find the ridge having the following course and altitudes: crossing the south line of Sec. 27, 400 paces east of the southwest corner—altitude 1,080 feet, and 100

feet above the Gogogashugun; passing near the center of Sec. 32—altitude 1,100 feet; leaving Sec. 32 near the southwest corner—altitude 1,060 feet; crossing the west line of Sec. 6 T. 45, R. 2 E., 400 paces north of the southwest corner—altitude 1,100 feet, from where the descent northward is about 100 feet in half a mile, the ridge now beginning to be more sharply defined; crossing Sec. 1, T. 45, R. 1 E., to the south quarter-post, where the altitude is 1,100 feet; leaving Sec. 11, 300 paces north of the southwest corner—altitude 1,100 feet, and descent 100 feet to the west quarter-post; crossing the south line of Sec. 10, 300 paces east of the quarter-post—1,140 feet, and descent to the southwest corner 190 feet; leaving Sec. 15 at about the west quarter-post, where the altitude is 1,140 feet, and where the descents to the northwest and southwest corners are respectively 200 and 100 feet; and leaving Sec. 16 near the south-west corner—altitude 1,120 feet, and descents within half a mile north and south, respectively, 200 and 70 feet."

Under the heading of Topography, a special description of the Montreal River is given on pages 86–87:

"MONTREAL RIVER, the Wasijiwang zibi of the Chippewas, drains a much smaller area than Bad river, but, though not carrying so much water as the lower Bad, is often as broad a stream, especially after the reception of its main branch, the Gogogashugun. The total area drained by the Montreal, in Wisconsin, is about 177 square miles. Since it forms, for a large portion of its course, the boundary between Wisconsin and Michigan, a large part of its drainage area lies within the latter state. The main tributary of the Montreal, the Gogogashugun, *is nearly as large a stream as the upper Montreal itself*, and receives a much larger share of the entire drainage area of the Montreal, as far as Wisconsin is concerned.

"The Montreal heads in T. 43, R. 3 E, in a tangle of swamps and small lakes, among which its

head-waters interlock with those of the Flambeau, the main tributary of the Chippewa. From here the course is a northerly one through T. 43, R. 3 E., and T. 44, R. 3 E—in which town it passes through Pine Lake—the current slow, the river narrow, and the banks generally alder, tamarack or cedar swamp. In the northeast part of Sec. 33, T. 45, R. 3 E., it meets the state line, and from this point to the mouth is itself the state line." (Italics ours)

On page 88 a description of the Gogogashugun River is given:

"The *Gogogashugun river* ('river crossed by a fallen, swaying tree') is the main tributary of the Montreal, and may quite properly be regarded as one of the two forks that unite to form the Lower Montreal. In Foster and Whitney's report, the Upper Montreal and Gogogashugun are called respectively the Pine and Balsam rivers. The name here given to the latter is taken directly from the Chippewas, who recognize as the 'Shingopes' or Balsam only one of the head-streams of the Gogogashugun. The total length of this stream is between 25 and 30 miles, in which distance there is a fall of nearly 500 feet. It heads in the swamp in the southeast corner of T. 44, R. 1 E., passes Island Lake in the southwest part of T. 44, R. 2 E., and eastward to the southern part of Sec. 21, in the same town, whence the course is nearly due north to the junction with the Montreal."

ELECTIONS SHOW OCCUPANCY AT EARLY DATE

In the Wisconsin Manual for 1867, page 266, a canvass of the lands for the election of 1867 shows Chambers Island as a part of Door County, Wisconsin. Exercise of jurisdiction by Wisconsin over these islands in Green

Bay has been continued and undisputed from the inception of Wisconsin's state-hood. This also shows development of country at this early date.

ACQUIESCENCE BY MICHIGAN IN EXERCISE OF JURISDICTION BY WISCONSIN

Such acquiescence appears from the bill of complaint

The bill of complaint shows upon its face a long acquiescence on the part of Michigan in the exercise by Wisconsin of jurisdiction over the territory in question. In fact, the whole bill is founded upon the proposition that Wisconsin is now and has from the day of the laying down of the boundary at all times exercised jurisdiction and sovereignty over the disputed territory without any active interference or even any attempt to exercise jurisdiction by the State of Michigan. The bill shows that only recently have there even been claims contrary to those of Wisconsin put forth by the State of Michigan, and admits freely an unquestioned acceptance of the boundary line as it is claimed by Wisconsin until 1907.

An attempt is made to explain away this acquiescence on the ground that the State of Michigan did not for many years discover any mistake in such boundary line as it was established. In view of the frequent linear and geological surveys that were made of this region a few short years after the laying down of the boundary, we do not believe that the State of Michigan can now, some eighty years thereafter, set up and urge a misleading mistake. Though a mistake had been made in the original laying down of the boundary, Michigan cannot claim with any force that she has been misled thereby

for a period of eighty years. So far as the islands in Green Bay are concerned, we cannot believe that Michigan was misled for any length of time. The channel out of Green Bay was never surveyed but apparently Wisconsin by common consent, and having no more knowledge of the topography of the bay than Michigan, assumed jurisdiction over the islands in question. Now Michigan, more than half a century later, seeks to oust her.

Neither can there be any question of misleading mistake with regard to the islands in the Menomonee River. We cannot see any possible equitable justification for Michigan's present action. Apart from doctrines of prescription, estoppel based upon equitable principles should apply.

In the following report of Capt. Cram, Michigan passed a resolution, set out in the bill of complaint as follows, Complaint pp. 15 and 16.

> " 'Whereas a critical examination of the topography of the country through which the boundary line between this state and the territory of Wisconsin must pass, appears to render a strict and literal conformity with the directions contained in the act of Congress establishing the same impossible: and, whereas, the general intent of said act, it is presumed, can be attained without much difficulty; if said line be immediately marked and described, therefore,
>
> " 'Be it resolved by the Senate and House of Representatives of the State of Michigan that the Congress of the United States be, and they are hereby earnestly solicited to cause the line in question to be surveyed and marked; and that, simultaneously with the survey, a commissioner be appointed by the general government to act, conjointly with the commissioner to be appointed by this state, and who by their concurrent action, shall

> so establish the boundary in question, if practicable, as shall be in conformity with the manifest general intent of the act of Congress.' ''

The government made provision for a further survey in accordance with such resolution but properly refused to appoint a commissioner to act with the commissioner appointed by the State of Michigan as a joint committee in the survey of the boundary. The grant having been made by authority of Congress to the State of Michigan, that state had no right to demand representation in fixing the limits of such grant. Moreover, the boundary line to be surveyed was also the boundary line of Wisconsin territory and in view of that fact, Michigan's proposal was obviously unfair.

It is significant, however, that the commissioner appointed in pursuance of that resolution by the Governor of the state, Dr. Houghton, Geologist for the State of Michigan, accompanied Capt. Cram. A Michigan official was there upon the ground with actual knowledge of the physical facts and of the conduct of the survey. The fact that no objection was entered on behalf of Michigan to the survey and that it apparently received the approval of Dr. Houghton seems to us of great significance.

On page 28 of the bill of complaint the following passage appears:

> "That for nearly fifty years after the said admission of the State of Wisconsin into the Union the territory, through which all that portion of said boundary above Lake Brule is located, remained wild and practically unknown to civilization, and the details of the geography thereof were unknown to the officials of the State of Michigan."

CONSTITUTION OF MICHIGAN SOLEMN ACT OF RECOGNITION

In 1850 the State of Michigan adopted a new constitution, already referred to, in which the boundaries were described substantially the same as in the Wisconsin enabling act, except that the words "as drawn upon the map by Capt. Cram" were omitted. This appears on page 29 of the bill of complaint. In view of the circumstances under which such constitution was drawn and the admitted belief that it described the boundary line drawn by Capt. Cram, we believe here is another clear example of acquiescence and do not see how Michigan can assert that:

> "* * * by said description in said last mentioned constitution the said State of Michigan reaffirmed its claim through its grant to all the territory on the Michigan side of the main channel, that being the west branch, of the Montreal River to its headwaters, that being Island Lake, * * *"

These statements in the bill of complaint are clearly erroneous in point of fact. Dr. Houghton accompanied Capt. Cram, and was as completely familiar with the geography of the country as any other man of that time. In fact, as it is stated in a later government report quoted above, the first adequate geological knowledge of the region commenced with Dr. Houghton's experience there, and the familiarity of Michigan authorities with this country is illustrated by the maps on pages 72 and 73.

GEOLOGICAL MAP
OF
MICHIGAN
BY
ALEXANDER WINCHELL, M.A.
STATE GEOLOGIST.
W. HEAL, PUBLISHER
Binghamton Pa
1869
LAKE
SUPERIOR
WISCONSIN
LAKE
MICHIGAN
MAP
SHOWING
UPPER MICHIGAN & WISCONSIN
BOUNDARY
TRACED FROM LEGISLATIVE ARREST
YEAR 1848

This map shows extent of development in the northern peninsula as early as 1876.

PROPOSED CONSTITUTION OF 1867 AN ACT OF RECOGNITION

In 1867 an amendment to the boundary description in the Constitution was proposed and inserted in the new constitution which was certified to the people by the constitutional convention of that year. The new description inserted the words "as marked upon the survey made by Capt. Cram." In the bill of complaint Michigan seems to attach considerable importance to the fact that this constitution was defeated. We find, however, that in the Michigan Manual for 1876 it is expressly stated on page 546 that the constitution of 1867 failed because of the increase in salaries of state officers and judges, and due to the proposed amendment giving suffrage to women.

In 1908 Michigan adopted a new constitution, already referred to, and described its northeast boundary in part as follows:

> "* * * to the mouth of the Montreal River; thence through the middle of the main channel of the westerly branch of the Montreal River to Island Lake, the headwaters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brule; * * *"

Here again is evidence of acquiescence. Not until today has it ever been contended that Island Lake, the head of the west branch of the Montreal River, was the Lake of the Desert referred to in the enabling act of the State of Michigan. In fact, the claim put forward by Michigan authorities in 1907 merely asserted that Capt. Cram had not found the main channel of the Montreal River and had not gone to the head thereof.

On page 37 of the bill of complaint the statement appears:

> "* * * but Wisconsin has asserted the claim to, and has taken possession of, and exercises dominion over several large, important islands, including Washington Island, Chambers Island, Strawberry Islands, and Plum Island, of a value amounting to several hundred thousand dollars, on the theory that the most usual ship channel of Green Bay runs West and North of said islands * * *"

A similar statement appears on page 40 of the bill of complaint.

IN DIVIDING MICHIGAN LAND FOR GOVERNMENTAL PURPOSES, THE STATE EVIDENCES ACQUIESCENCE

In 1843 the legislature of Michigan passed an act entitled:

> "AN ACT to divide the upper peninsula into six counties, and to define the boundaries of the same." Acts of the Legislature of the State of Michigan, 1843.

It provides as follows:

> "Sec. 6. All that portion of the state embraced within the following limits, shall be laid off as a separate county, to be known and designated as the county of Delta, to wit: Beginning at a point on lake Michigan south of the line between ranges twelve and thirteen [12 and 13] west, thence southwardly along the margin of said lake to Green Bay, thence along the north and west shores of said bay to the Menominie River, thence northwestwardly *along the boundary line between Michigan and Wisconsin*, to the line between ranges thirty-seven and thirty-eight [37 and 38] west, thence east along the north boundary of township forty-one [41] to the line between ranges twelve and thirteen [12 and 13] west, thence south to the point of beginning." (Italics ours)

It is to be noted that here is a division into counties, for purposes of government, of the territory of the upper peninsula and that such counties are described by ranges and townships according to government surveys, and that all of those counties lying along the boundary line are described so as to reach only to such line as it is claimed by Wisconsin and no further. There is a reference in the description of the boundaries of Delta County to "the boundary line between Michigan and Wisconsin," as though such boundary were a fixed and established line. There is no mention of the islands in Green Bay which Michigan now claims.

In 1861 the County of Bleeker was created out of some of the original four counties with boundaries as follows:

> "Section 1. *The People of the State of Michigan enact,* that townships numbered thirty-one north, range twenty-seven west; thirty-two north, ranges twenty-six, twenty-seven and twenty-eight west; thirty-three north, ranges twenty-six, twenty-seven and twenty-eight west; thirty-four north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine west; thirty-five north, ranges twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine west; thirty-six north, ranges twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight west; thirty-seven north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight west; thirty-eight north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine west; thirty-nine north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty west; forty north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one west; forty-one north, ranges twenty-five, twenty-six, twenty-seven, twenty-eight,

twenty-nine, thirty, thirty-one west, be and the same are hereby organized into the county of Bleeker." Laws of Michigan, 1861.

Two years later, in 1862, the name of such county was changed to Menominee County. Laws of Michigan, 1862, p. 297. Here again the boundaries of the county reach only to the line as it is claimed by Wisconsin.

The same recognition by the State of Michigan of the Cram line as the limit of Michigan sovereignty is found in subsequent dealings with this land of the upper peninsula. In 1887 Gogebic County was created out of a part of Ontonagon County. Local Acts 1887, p. 23. The description of the new county lays down a boundary co-extensive with the state boundary as Wisconsin believes it to be.

In 1885 the legislature passed an act to organize the township of Ironwood, in the county of Ontonagon, in which the description, according to government section and township lines, is made to run to the Wisconsin state line along the east branch of the Montreal River and no further. Local Acts 1885, p. 467. Here again seems to be a recognition by Michigan of, and an acquiescence in, Wisconsin's claims.

Attached hereto as an appendix are some further maps which evidence recognition on the part of the United States of Wisconsin's sovereignty over the territory in question, and acquiescence on the part of Michigan, mainly:

(a) A sketch of the public surveys in Michigan, dated 1847, published by the General Land Office;

(b) A similar sketch dated 1848;

(c) A similar sketch dated 1849;

(d) A map of the northern peninsula of Michigan, showing the several districts surveyed on which geological and topographical reports have been made, dated 1849;

(e) A diagram of the State of Michigan (upper peninsula), showing the districts embraced in contracts for subdivisions;

(f) Sketch of the public surveys in Michigan for 1862;

(g) A map of the State of Michigan, published by the General Land Office in 1904;

(h) A geological map of Michigan by the State Geologist;

(i) Map of the mineral district of northern Michigan, published by the Michigan College of Mines Catalog;

(j) Map showing state reward roads of Michigan in the upper peninsula, published by the State Highway Department in 1917;

(k) Map of the Port des Mortes passage in Green Bay, published by the United States War Department and the Survey of the Northwestern Lakes in 1923;

(l) Map of the Rock Island passage in Green Bay, published by the United States War Department and the Survey of the Northwestern Lakes in 1923;

(m) Map of the Entrance to Green Bay, published by the United States War Department and the Survey of the Northwestern Lakes in 1923;

(n) Railroad map of Michigan prepared for commissioner of railroads 1878.

(o) Lake Vieux Desert.

THE DOCTRINE OF ACQUIESCENCE

As has been stated, the contention of the defendant, State of Wisconsin, is based upon the theory that acquiescence over a long period of time by one state in the exercise of jurisdiction by another state in good faith over a part of the territory included within its grant, not only bars such state from disputing the sovereignty of the possessing state over such disputed territory, but actually operates, by the doctrine of prescription or by similar doctrines, to vest a sovereign title in such possessing state from the beginning.

This doctrine has been enunciated time and again and has become so thoroughly established by cases in this, the Supreme Court of the United States, and in various of the federal district courts, that we do not believe it can be now questioned.

In *Louisiana v. Mississippi*, 202 U. S. 1, the court applied these doctrines and declared:

> "The question is one of boundary and this court has many times held that, as between the states of the union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect to the acquisition by prescription of large tracts of country claimed by both. *Virginia v. Tennessee*, 148 U. S. 503; *Indiana v. Kentucky*, 136 U. S. 479; *Missouri v. Kentucky*, 11 Wall. 395; *Rhode Island v. Mass.*, 4 Howard 591" (p. 53).

The court discussed these facts:

(a) Recognition by the United States of Louisiana's title to the disputed strip;

(b) Continued assertion by Louisiana of her sovereignty over such territory;

(c) *Repeated* recognition by Mississippi of Louisiana's ownership and the fact that Mississippi had not until shortly prior to the suit disputed it.

Louisiana's jurisdiction over the disputed territory was unquestioned from the date such land was included within her boundaries in 1812 to 1898, when the dispute between the two states had its inception, a total period of 86 years. Such jurisdiction was to the exclusion, however, of the state of Mississippi, only after such state was admitted into the Union in 1817, a total period of 81 years, and the first active exercise of jurisdiction by Louisiana dated from 1852, when the lands in question were approved to Louisiana by the commissioner of the general land office of the United States. Undisputed *exercise* of jurisdiction by Louisiana covered only a period of 46 years. The court, however, seemed to consider that no actual interference with the exercise of jurisdiction by Louisiana took place until the commencement of the action in 1905, and that such was the proper period to be considered. Though Mississippi raised some question as to Louisiana's sovereignty, nevertheless possession by Louisiana was not interferred with or in any way disturbed. Titles traced from 1852 ran unmolested for a period of 53 years.

The case at bar is very similar. Michigan was admitted into the Union in 1837, and her boundaries were surveyed and a line run in 1841, which is identical with the line which Wisconsin claims to be the true boundary line. From 1841 until 1907, when a dispute over the boundary first arose, Michigan acquiesced in and considered that line as re-run by the Burt survey of 1847 as the true line, a total of 66 years. The departments of government of Michigan have, however, acquiesced in an exercise of jurisdiction over such territory from 1841

until the present, a total period of 82 years, and the state of Wisconsin has exercised jurisdiction over such territory from 1848, when such land was surveyed, and plotted and original plot maps filed with the general land office of the United States, until today, a total of 75 years.

The doctrine of the Louisiana case was applied in *Rhode Island v. Massachusetts*, 4 Howard 591. The court there held that a boundary line which had in the past been disputed, surveyed by a joint commission, and the line as so run acquiesced in, should not be disturbed upon an allegation of mistake which was not clearly made out. The court said:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." (639)

Again, in *Virginia v. Tennessee*, 148 U. S. 503, the court made the statement which has been so often quoted since that case, that:

> "Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in Penn v. Lord Bal-

timore, 1 Vesey Sen. 444, 448; Boyd v. Graves, 4 Wheat. 513; Rhode Island v. Massachusetts, 12 Pet. 657, 734; United States v. Stone, 2 Wall. 525, 537; Kellogg v. Smith, 7 Cush. 375, 382; Chenery v. Waltham, 8 Cush. 327; Hunt on Boundaries, (3d. ed.) 306.

"As said by this court in the recent case of the State of Indiana v. Kentucky, (136 U. S. 479, 510,) 'it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'"

There a joint commission had run the line in question, and the line as run had been adopted by the legislatures of both states. The court discussed the question of whether such a compact was prohibited by the Constitution of the United States, but thought that, independently of any such compact, Virginia had acquiesced in exercise of jurisdiction by Tennessee over the territory in dispute for a long period of time and could not now question her ownership. In that case, differences over

the line in question had arisen 54 years subsequent to its establishment and approval. Suit was brought 90 years after such establishment.

In Maryland v. West Virginia, 217 U. S. 41, the principle was again applied. The court there said:

> "An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.
>
> "True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.
>
> "The effect to be given to such facts as long continued possession 'gradually ripening into that condition which is in conformity with international order,' depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, Sec. 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. *Rhode Island v. Massachusetts,* 12 Pet. 657." (44)

It is significant that this court there declared:

> "True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line."

The boundary line had been more or less in dispute during nearly all of the period between its establishment and the bringing of the suit in question, but the court, relying upon a general acceptation of the boundary line in question by the local population and some official recognition of it by the state governments concerned, held that the principle of the Louisiana and the Virginia cases applied. The court said:

> "It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society.
>
> "• • • •
>
> "A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored." (41)

A number of other cases recognized the rule.

Belding v. Hebard, 103 Fed. 532;

Arkansas v. Tennessee, 246 U. S. 158, 174.

The rule has been generally applied.

Missouri v. Kentucky, 11 Wall. 395;

Moore & McFerrin v. McGuire, 142 Fed. 786;

Stevenson v. Fain, 116 Fed. 147, 155;

North Carolina v. Tennessee, 235 U. S. 1.

Text writers seem to have come to the same conclusion. Vattel in his Law of Nations says:

> "The tranquility of the people, the safety of states, the happiness of the human race do not

allow that the possessions, empires, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title" Book II, c. 11, sec. 149.

Wheaton, in his International Law, says:

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question" Part II, c. 4, sec. 164.

The Digest of International Law, published in House Document 551, 56th Congress, 2d Session, Vol. 128, Part I, and written by John Bassett Moore, cites some of those cases here cited, and recognizes them as sound law. Moore, quoting from the case of *Virginia v. Tennessee*, 148 U. S. 503, says:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life" (749).

THE GRANT TO MICHIGAN DOES NOT ANTEDATE THAT TO WISCONSIN

Michigan's bill of complaint, as has been mentioned, is based upon the proposition of priority in grants, and all of the foregoing discussion assumes such hypothesis to be correct. We do not believe, however, that in point of fact the grant to Michigan antedates that to Wisconsin, and, therefore, adopting the argument of the state of Michigan, we believe that Wisconsin is properly sovereign over the lands in dispute by virtue of a prior grant. Michigan points to her enabling act, antedating that of Wisconsin by nine years, and rests. This premises that the proposed boundaries were considered as a matter of course by the people. This we do not believe to be the case.

Michigan's territory was originally set off and described as that territory north of an east and west line drawn through the southern bend of Lake Michigan, and east of a north and south line drawn through the center of that lake. 2 Story's Laws of United States, ch. 66, p. 957. Later, territory west of such line to the Mississippi River was attached to the territory of Michigan for jurisdictional purposes, by an act approved April 18, 1818. But the north and south line drawn through Lake Michigan was retained as the dividing line, and territory to the east of such line was looked upon as one of the two potential states to be erected out of that territory north of an east and west line drawn through the southern bend of Lake Superior, in accordance with the ordinance of the northwest, and the territory to the west of such line was looked upon as the other. This appears to have been

the view of even those people living in the original territory of Michigan.

Lucius Lyon, delegate of the territory to Congress, in arguing Michigan's contention with regard to the Ohio-Michigan boundary dispute before the Judiciary Committee of the United States Senate, stated:

> "Over the residue of the territory north of the east and west line, the territory west of Lake Michigan, the people within the original boundaries of Michigan had no control. Congress had debarred them of the privilege of availing themselves of the population of what is now called the Wisconsin territory, by the act temporarily annexing it to Michigan." (32)

Again,

> "The annexation of the Wisconsin country to Michigan, like the more recent annexation of the territory west of the Mississippi, was made to save the necessity and expense of another Territorial Government. But that annexation has never been supposed by the people of Michigan to confer upon them any claim to any portion of the annexed territory; nor has it ever been believed by them to indicate any intention on the part of Congress to add it to Michigan. On the contrary, they consider that such a proceeding would operate injuriously and unjustly upon their fellow-citizens west of Lake Michigan, both in a political and territorial point of view." (35)
>
> Senate Document No. 211, 1st Session, 24th Congress, 1835–36.

In 1835, the people of that part of the territory of Michigan lying east of the north and south line, referred to above, adopted a constitution in pursuance of an act of the territorial legislature, and at the same time elected a governor and other officers. The act of the territorial legislature which initiated such steps contem-

plated a state having the same boundaries as did the original territory of Michigan, and the constitution in question was adopted by a vote of the electors in that territory alone. The people of the northern peninsula were not represented and had no voice in the adoption of the constitution.

The constitution in question contained no definition of the boundaries, but it is quite clear from the initiating act that the old territorial boundaries were contemplated. Now, this adoption of a constitution prior to due authority from Congress was an unwarranted and irregular proceeding, but Congress waived the irregularity. The enabling act of Michigan provided:

> "Sec. 2. And be it further enacted, That the constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby, accepted, ratified and confirmed, and that the said state of Michigan shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatever: Provided always, and this admission is upon the express condition, That the said state shall consist of, and have jurisdiction over all the territory included within the following boundaries, and over none other, to wit: * * *.
>
> "Sec. 3. And be it further enacted, That as a compliance with the fundamental condition of admission contained in the last preceding section of this act, the boundaries of the said state of Michigan, as in that section described, declared and established, shall receive the assent of a convention of delegates elected by the people of said state, for the sole purpose of giving the assent herein required; and as soon as the assent herein required shall be given, the president of the United States shall announce the same by proclamation; and thereupon, and without any further proceeding on the part of congress, the admission of the said state into the Union, as

one of the United States of America, on an equal footing with the original states in all respects whatever, shall be considered as complete, and the senators and representative who have been elected by the said state as its representatives in the congress of the United States, shall be entitled to take their seats in the senate and house of representatives respectively, without further delay." 5 U. S. Stats. at L. 49.

The authorized boundaries of Michigan were, however, different from those contemplated in the constitution already framed.

The people of the territory took no advantage of the wider authority given to them, and no new constitution was drawn up and adopted.

In 1836 a rump convention met at Ann Arbor, Michigan, and assented to the boundaries forced upon Michigan by Congress. It is significant that such convention was a voluntary convention, not chosen by the people or regularly elected after act of territorial legislature. A prior convention, properly called, had refused to assent to the admission of the state upon the terms imposed by Congress. It is to be noted also that in such "convention of assent", as it has gone down in history, the people of the northern peninsula were not in any way represented. The assent purported to be merely the assent of the southern peninsula to *take* the upper peninsula in exchange for the giving of a strip on the southern boundary, but it did not purport to be an assent of the *given* to the taking.

Congress, however, chose to treat the assent of this convention as the assent of the people of the lower peninsula to the proposed annexation, and on January 26, 1837 Congress passed an act providing:

"Whereas, in pursuance of the act of congress of June the fifteenth, eighteen hundred and thirty-

six, entitled 'An act to establish the northern boundary of the state of Ohio, and to provide for the admission of the state of Michigan into the union upon the conditions therein expressed,' a convention of delegates, elected by the people of the said state of Michigan, for the sole purpose of giving their assent to the boundaries of the said state of Michigan, as described, declared and established in and by the said act, did, on the fifteenth of December, eighteen hundred and thirty-six, assent to the provisions of said act, therefore:

"Section 1. Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, That the state of Michigan shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

"* * * *"

5 U. S. Stats. at L. 144.

It may be seriously questioned whether in legal contemplation the people of the southern peninsula ever gave their consent to the proposed boundaries at this time, but it is at least evident that here is a constitution in which the people of the northern peninsula have had no voice, a constitution which they have not helped to make. It is obvious that by legislative fiat, and without its consent, a territory cannot be annexed to and made part of a state. This proposition was advanced by Michigan in the controversy with Ohio and admitted by Congress through the Judiciary Committee of the Senate, wherein it was said:

"When the people of Indiana were authorized to form a State constitution, neither the people of Ouisconsin, nor the people of that part of Michigan not included in the State then to be formed, were consulted as to the organization of the Government about to be established, or the extent and limits of its jurisdiction. There does not appear to have

been entertained, at that day, the most vague supposition that Congress had, by placing Michigan and Ouisconsin under a temporary Territorial Government, decided that there ought not to be formed one or more States north of the east and west line. Neither have we any evidence that it was contended, that the guaranty then given to the people of Michigan or of Ouisconsin, of certain rights and privileges, included a right to assist in the formation of a State to be admitted into the Union: * * *." Rep. 380, Reports of Committees, 1st Session, 24th Congress, 1835-36, p. 11.

Here the people of the northern peninsula have in no wise consented to become a part of the newly created state of Michigan, subject to a constitution and laws with which they have had nothing to do. It seems equally plain to us that the people of the southern peninsula, who adopted a constitution for themselves and repeatedly disclaimed any interest in, or jurisdiction over, those people of the north, would not consent to any forced annexation.

Thus, the Act of Congress, admitting the State of Michigan into the Union, can at most be construed to be a grant of sovereignty to the State of Michigan over the lower peninsula under a designated constitution, and an offer accepted at the time by the people of neither peninsula to extend such sovereignty over the upper peninsula as well.

We find this recognized only a few years later by the State of Michigan itself. In 1840, the legislature addressed a joint resolution to Congress which appears on page 15 of the Bill of Complaint. reciting:

"Whereas a critical examination of the topography of the country through which the boundary line between this state and the territory of Wisconsin must pass, appears to render a strict and literal con-

formity with the directions contained in the act of Congress establishing the same impossible: and, whereas, the general intent of said act, it is presumed, can be attained without much difficulty; if said line be immediately marked and described, therefore,

"Be it resolved by the Senate and House of Representatives of the State of Michigan that the Congress of the United States be, and they are hereby earnestly solicited to cause the line in question to be surveyed and marked; and that, simultaneously with the survey, a commissioner be appointed by the general government to act, conjointly with the commissioner to be appointed by this state, and who by their concurrent action, shall so establish the boundary in question, if practicable, as shall be in conformity with the manifest general intent of the act of Congress."

In 1846, Congress passed an act entitling the people of Wisconsin to form a state government with boundaries which the state of Michigan now claims are in conflict with hers. If that is so, nevertheless, here is a new authority by Congress complied with by the people of Wisconsin, and in consequence thereof, a grant of sovereignty in 1848 to the state of Wisconsin over the territory described in the enabling act. The offer of Congress made to Michigan in 1837 had not been accepted at that time, and in fact there was no acceptance of any sort by both lower and upper peninsula until 1850, when the state of Michigan, *with the people of the upper peninsula voting,* adopted a new constitution.

The grant to Wisconsin, then was two years prior to any grant of sovereignty over the lands of the upper peninsula to the state of Michigan, and being prior in time, is prior in law. *Qui est prior in tempe est prior in lex.*

This seems to have been the view taken by the United

States government at the time. The enabling act of Wisconsin contains the provision with regard to that part of the grant which, in the minds of Congress, might be considered to encroach upon land covered by the offer to Michigan.

> "That the adjustment of boundary as fixed by this act between Wisconsin and Michigan shall not be binding on Congress unless the same shall be ratified by the State of Michigan on or before the 1st day of June, 1848."

Here is a direct grant to Wisconsin which shall not be binding *upon Congress* unless Michigan accepts the Wisconsin boundary as her own. Congress realized that it had the power to grant sovereignty over this territory to Wisconsin, but feared that if it made a grant binding upon itself, the state of Michigan or the people of the upper peninsula might refuse to adopt those boundaries and leave a gap between the boundaries of Michigan and the boundaries of Wisconsin, thus requiring the formation of a small state in the upper peninsula. No other interpretation of this language seems possible.

Again, the old northwest ordinance having contemplated that the northern peninsula should form part of the state of Wisconsin, Wisconsin's right to the northern peninsula should no more be taken from Wisconsin without the consent of the people inhabitating the entire territory, than could the strip given to Ohio in 1836 be taken from Michigan without its consent. Michigan rested its entire case upon just this proposition from 1834 to 1836. We think Michigan was right in this contention. Being right, she was bound by the same kind of justice when Wisconsin was to lose part of its territory to the state of Michigan. That being true, no binding disposition of these boundary controversies could be

made until Wisconsin aspired to statehood, and until she gave her consent. This time did not arrive until the Wisconsin enabling act was passed and the people of Wisconsin were given an opportunity to express their wishes in this respect. As previously stated, apparently Congress recognized this same theory when it said that the boundary dividing Wisconsin and Michigan should not be binding upon Congress until Michigan accepted the boundary. It is the defendant's contention that this boundary did not become binding, either on Congress, on Wisconsin or on Michigan until the adoption of the Michigan constitution in 1850. At that time all parties finally agreed to the modified boundary, the boundary now claimed by Wisconsin.

CONCLUSION

Upon the complaint, therefore, and the records to which we have called the court's attention, we submit it is clearly shown that the boundary line so long claimed by Wisconsin and recognized by the United States government and by the state of Michigan has become, and now is, the proper boundary line between these two sovereignties; that such boundary line should not be disturbed at this late date; and that within the authorities submitted it can not now be disturbed. Moreover, it is further submitted that the present boundary line as claimed by Wisconsin became fixed, certain and binding upon Wisconsin and Michigan in 1850 by the acceptance of the boundary by the state of Michigan, in accordance with the conditions of the enabling act of Wisconsin.

For the reasons herein indicated, it is respectfully submitted that the plaintiff's complaint should be dismissed

as to the entire boundary, but if the court should be of the opinion that there is any doubt about the boundary line in Green Bay or in the Menomonee River by reason of the fact that the exact line is not definitely laid out, identified and established by proper monuments, then it is submitted that all that is necessary to be done is to identify and lay out and mark the boundary in the Menomonee River and in Green Bay in accordance with the boundaries as claimed by Wisconsin, and so as to include all of the islands and territory now claimed by Wisconsin. As to the boundary in the Montreal River section, it is submitted that there can be no doubt that the boundary as claimed by Wisconsin is the proper boundary, and that the state of Wisconsin should not be put to the expense of establishing, in an ordinary trial, that which now appears certain beyond all doubt from the records to which we have called the court's attention.

All of which is respectfully submitted.

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